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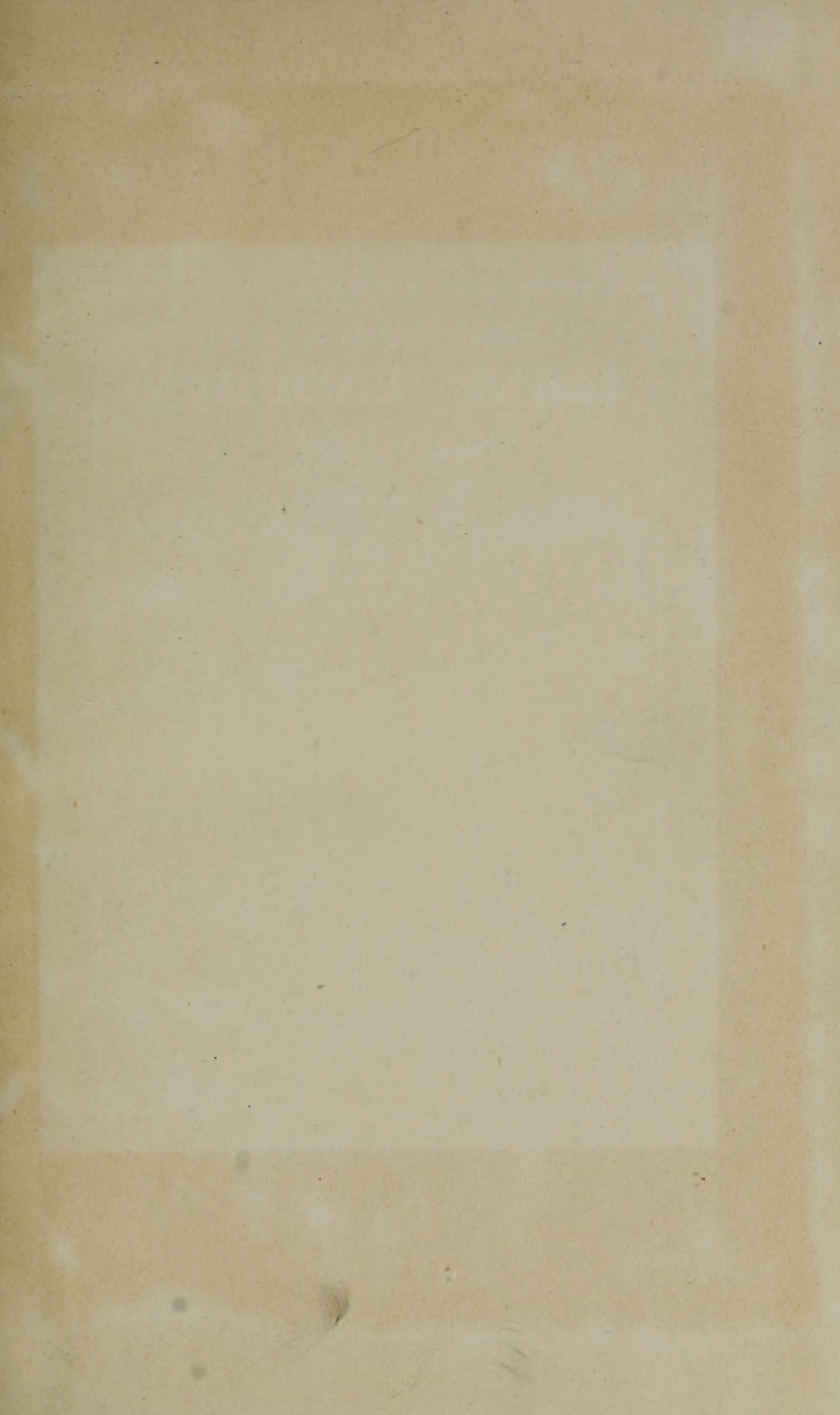
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798
No. 2232

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES)

FRED STEBLER,

Appellant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSO-
CIATION, a Corporation, and GEORGE D.
PARKER,

Appellees.

VOLUME II.

(Pages ~~369~~ to 793, Inclusive.)

685

Upon Appeal from the United States District Court for the
Southern District of California.

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U.S. Circuit Court of Appeals
For the Ninth Circuit
Transcript of Record

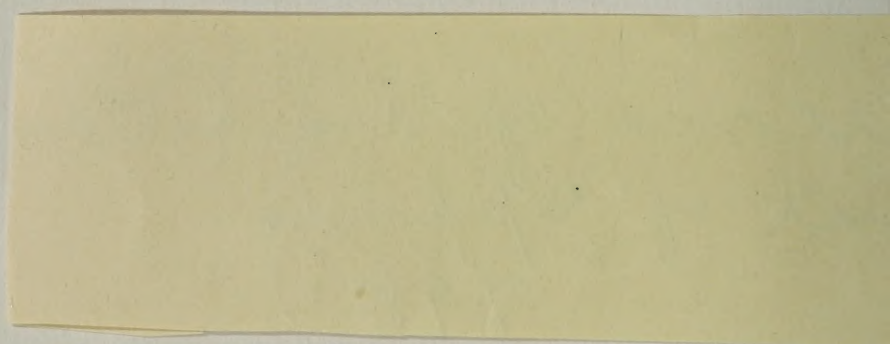
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Court of appeals
798

PARKER

VOLUME II

(Pages 300 to 350 inclusive)

Reproduced from the United States District Court for the
Southern District of California



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(Deposition of Arthur P. Knight.)

different. I would add that this machine would not be adapted to grading oranges for the reason that the ribs on the rollers would mutilate the fruit so as to render it useless, but in so far as it would work with anything its principle would be the same.

Q. 39. You have referred to the fact that in this exhibit Defendant's Exhibit "Hutchins Patent," the grading elements are superposed one above the other, while, as you have stated, the grading rollers *consisting the* grading element of the patent in suit and of defendant's machine are arranged end-to-end. Does this construction *illustrate* in this Hutchins Patent throw any light, in your opinion, upon the meaning of the term "end-to-end," as used in the patent in suit?

A. Yes, sir. I think that this construction is an example of a construction other than end-to-end, that is to say, the successive grading elements are not displaced [703] endwise in relation to each other, but transverse, this is to say, one above the other. I would like here to call attention to another defect in this construction of Hutchins, which is overcome by the end-to-end construction. Each grading element of the Hutchins device discharges a portion of the fruit over the end and another portion passes through between the two members of the grading element. Now, the portion that passes over the end in the Hutchins device is the separated portion sized by that element and the portion which passes through to the next element is the portion which is not sized or graded by that element. Consequently, if a large

(Deposition of Arthur P. Knight.)

number of such elements were used, such as is required in orange packing, the fruit which passes onto the last grading elements would have to pass through all of these grading devices, that is to say, between each set of rollers and belts successively being subject to a correspondingly great amount of wear and tear in the operation, whereas, with the end-to-end arrangement, the fruit which passes through between the two members of each grading element is immediately removed from the machine and does not have to undergo this grading operation again and the other fruit, which does not pass through, simply runs to the next grading element.

Q. 40. The oranges would drop by gravity through from one grading element to another in this Hutchins device, until it found the roller and belt which formed an opening slightly less than its size, would it? [704] A. Yes, sir.

Q. 41. And in your opinion, the successive falls of the oranges in that machine would be a deteriorating agent inducing decay in the oranges?

Mr. ACKER.—Objected to as leading in the extreme, furthermore, this witness has repeatedly testified that he is not qualified to testify as an expert in regard to the orange industry.

A. Yes, sir.

Q. 42. Proceed with your answer to the former question, Mr. Knight.

A. (Continuing.) The Rayburn patent, being Defendant's Exhibit "Rayburn Patent," number 726,756,—

(Deposition of Arthur P. Knight.)

Mr. LYON.—(Interruping.) This is the patent, Mr. Knight, is it not, that the application for Robert Strain for a reissue, resulting in the reissue patent in suit, was in interference with?

A. Yes, sir.

Mr. LYON.—You need give this patent no further consideration.

A. (Continuing.) Defendant's Exhibit "Bailey Patent," being letters patent number 671,646. This is a fruit grader comprising a series of grading elements, each element being double and one member *or* each side consisting of a vertically adjustable plate carrying a series of disks, the other member of each grading element consisting of the corresponding portion of a rotary disk or ring having inclined or beveled edges so that as the fruit [705] is delivered up onto the ring it is carried on by the ring into contact with the disks "12" of the successive sections and the supporting plates of these disks are adjusted so that the aperture between the rotating carrying disks and the disk carried by the adjustable plates increases in steps, the fruit passing through as soon as it reaches an aperture of sufficient size. In regard to the broad principle of operation, this machine is similar to the California, the Strain and other rope and roller graders. It has, however, inherent defects, which, in my opinion, prevents it from being an equivalent for any of these other straight line graders, its rotary motion leading to inherent difficulties in operation. To secure any considerable capacity in the machine, it would have to

(Deposition of Arthur P. Knight.)

be given a considerable angular velocity and this would result in an appreciable centrifugal action on the fruit, tending to increase the outward pressure on the other side of the machine and decrease the discharging pressure on the inner side, furthermore, this circular shape renders it necessary to use a large number of disks "12" for each section and this does not give a smooth-bearing face for the fruit.

Q. 43. In your opinion, Mr. Knight, based upon your observation of fruit graders and your knowledge of oranges and the orange industry, as heretofore testified by you, would or would not a device built in accordance with Defendant's Exhibit "Bailey Patent," be a practical commercial machine for sizing oranges?

Mr. ACKER.—Objected to as incompetent, irrelevant and [706] immaterial and on the further ground that the witness has not been shown to possess the qualifications necessary to testify to such fact.

A. My opinion is that it would not be a practical commercial machine.

Mr. LYON.—Proceed.

A. (Continuing.) Defendant's Exhibit "Hutchins Patent No. 2," being letters patent number 465,856. This is similar in construction and operation to the Hutchins patent, above described, and open to the same comments.

Defendant's Exhibit "Huntley Patent," being letters patent number 538,330. I find no special similarity between the construction shown in this

(Deposition of Arthur P. Knight.)

patent and that of either the Strain or Parker machines. The fruit runs by gravity along a guide-way under a roll which is spaced from the guide-way so that the space gradually increases and the fruit is ejected from the guide-way by the friction of the roll moving in such direction as to lift the fruit over the side of the guide-way. This is not the principle of operation of either the Strain or the Parker machines.

Defendant's Exhibit "Burke Patent," being letters patent number 482,294. In this machine the grade-way is formed by two stationary members, each of which is stepped and the fruit is drawn along between said members by a belt carrying fingers, which extend up into the grade-way and push the fruit along. This is not the principle of operation of either the [707] Strain or the Parker machines.

Defendant's Exhibit "Jones Patent No. 2," being letters patent number 442,288. This is strictly a roller machine, the grade-way being formed on one side by a roller, a rotating roller having a series of stepped sections and on the other side by a stationary member which serves as a fixed wall. There is no longitudinally moving member for conveying the fruit along the grade-way and presenting it successively to the different sections or rotating members and the principle of operation is therefore different to that of either the Strain or the Parker machine.

Defendant's Exhibit "Jones Patent," being letters patent number 430,031. This is similar to the

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Jones patent number 442,288 and the same remarks apply.

Defendant's Exhibit "Ish Patent," being letters patent number 458,422. This is the typical rope and roller grade, Ish showing a belt, but stating that he may use a rope. The principle of operation of this patent is that of carrying the fruit by the operation of the longitudinally moving member along the grade-way and presenting it successively to contact with successive roller sections of different diameters so that as soon as it reaches an aperture of sufficient size it will pass through. As far as concerns the act of grading the fruit in any one section, the Ish operation is similar to that of the Strain and Parker machines, but as regards a complete machine providing [708] for the grading of a number of sizes, the machine is different in that the several grades are provided for on a solid roller having stepped sections which sizes are predetermined and invariable. In the machine as illustrated then, there is no provision for individual or independent adjustment or variation of the sizes of successive sections so as to give any desired variation to the grading along the grade-way.

Defendant's Exhibit "Ellithorpe Patent" being letters patent number 399,509. I find nothing in this patent requiring comment as it is of the gravity table type in which the fruit is sized by passing over a table with differently sized holes.

Defendant's Exhibit "Maull Patent," being letters patent number 673,127. This is a rotary grader

(Deposition of Arthur P. Knight.)

having a central wheel forming the inner member of the grade-way and an outer curved gauge, preferable of volute shape, which forms the outer member of the grade-way, a series of spouts being arranged directly below the grade-way so that as the fruit is carried around by the rotation of the wheel it will fall through between the inner and outer members of the grade-way, as soon as it reaches a point where the space is sufficiently great and will fall into the corresponding spout. This is somewhat similar to the Bailey patent in general principle of operation but it does not have separate sections of the outer member and does not appear to me of any special interest in this connection. [709]

Defendant's Exhibit "Fleming Patent," being letters patent number 475,497. The principle of operation of this machine is entirely different from that of the Strain or Parker or any rope and roller grader, the fruit being carried along by a belt and falls through apertures whose size are controlled by tilting flaps which are let down gradually by passing over an incline.

Defendant's Exhibit "Jones Patent of 1894," being letters patent number 529,032. This is a machine of the rotary type operating by gravity, the grade-way being formed by two concentrically mounted rotating members and the weight of the fruit causing the members to turn so that the fruit is carried through the grade-way from the portion of less width to portions of greater width. I see no special resemblance between this and the Strain or

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Parker machines.

Defendant's Exhibit "Woodward Patent," being letters patent number 466,817. This is a rope grader, the grade-way being formed by two ropes mounted so that the space between them diverges gradually and the fruit being carried along by the ropes and falling through as soon as it reaches a point of sufficient separation. There is no provision for individual or independent adjustment or variation of successive portions so as to provide for variation in grading and the machine is in that respect different from the Strain and Parker machines as well as in the general respect of being a rope grader instead of a rope and roller grader. [710]

Defendant's Exhibit "Cerruti Patent," being letters patent number 534,783. This is also a rope grader and the same remarks apply to it as to the Woodward patent.

Q. 44. You have read the testimony of the defendant, George D. Parker, that at the packing-house at Uplands, in an alleged test of the grader of the patent in suit without the use of the positive belts for driving the rollers the fruit would clog, have you?

A. Yes, sir.

Q. 45. In your investigation of such graders, did you pay any particular attention to such operation having in view this testimony? A. Yes, sir.

Q. 46. Do you agree with the testimony that Mr. Parker gives in that regard?

A. I do not. As far as I could determine from my investigation the fruit did not clog in the grade-

(Deposition of Arthur P. Knight.)

way as long as there was a clear passage below. In some cases I found that the fruit had accumulated to an extent in the bins that it piled up in the space directly below the grade-way and in that situation there was clogging at that point.

Q. 47. Where you noticed such clogging, were the belts driving the rollers or were they removed.

A. At that particular location the rollers were being driven by the belts. We did not have an opportunity to examine in this case where there was such accumulation [711] with the belt taken off.

Q. 48. In other words, if I understand your testimony correctly, with this accumulation of oranges under the grade-way, even with the belt on the rollers and in position to rotate them, and rotating them, still the oranges clogged in the run-way of the grader?

A. Under those circumstances, yes.

Mr. LYON.—You may take the witness, Mr. Acker.

Cross-examination.

(By Mr. ACKER.)

XQ. 1. Do I understand you to testify that in the Upland packing-house that you examined Strain sizers constructed under the patent in suit and likewise a Parker sizer?

A. That is my recollection.

XQ. 2. You are positive that there was a Parker sizer in that packing-house?

A. No, I could not swear to the exact location of the sizer.

(Deposition of Arthur P. Knight.)

XQ. 3. You are not able to state at this time whether you examined a Parker sizer in that house or not?

A. My recollection is directed mainly to the operation of the Strain machine and I could not swear positively whether I examined the Parker machine or not there.

XQ. 4. In your direct examination I understood you to say that you examined both.

A. That is my recollection but I could not swear positively. [712]

XQ. 5. Is the balance of your testimony based on the same recollection of the machine?

A. At the Riverside Heights packing-house I remember distinctly the Parker machine.

XQ. 6. What time did you devote to the examination of the machines at the various packing-houses that you have referred to?

A. It took us substantially a whole day to make the examinations.

XQ. 7. That is a whole day divided between the various houses? A. Yes, sir.

XQ. 8. And that would give approximately how much time at each place?

A. I should judge that we spent between a half an hour and an hour at each place.

XQ. 9. For what time did you examine the Strain machine with the belts removed?

A. About half an hour.

XQ. 10. Can you state approximately the quantity of fruit that passed through the grader during

(Deposition of Arthur P. Knight.)

your examination? A. No, sir.

XQ. 11. What portion of the sizer, Mr. Knight, requires the most delicate adjustment?

A. Well, I should say the rollers.

XQ. 12. What portion of the run-way relative to its length?

A. I could not say as to that. [713]

XQ. 13. Your knowledge of the fruit grading industry is not sufficient to enable you to answer that?

A. No, sir.

XQ. 14. Please state in detail what knowledge you have of the orange industry and more particularly the use of sizing machines, and the extent thereof.

A. My knowledge of the industry and of the machines is confined to that gained by the inspections made on several occasions for my own instruction and as to the extent of the industry I cannot claim to have any special knowledge.

XQ. 15. You say for your own instruction. For the purpose of enabling you to testify for the purposes of this suit? A. Yes, sir.

XQ. 16. What machines have you examined in practical operation?

A. The Strain or Stebler machine, the H. K. Miller machine and the Parker machine.

XQ. 17. The H. K. Miller machine was the one that was involved in the previous suit?

A. Yes, sir.

XQ. 18. And to all intents and purposes, except for the utilization of power drive belts for the rollers

(Deposition of Arthur P. Knight.)

was the same as the Strain?

A. There was a slight difference in the way the rollers were held but it was practically the same.

XQ. 19. Would it be a fair statement to state that your knowledge of the practical operation of sizing machines [714] for fruit has been confined to the Strain type of machine and the Parker type?

A. I would go further than that and say that it has been confined to the Strain type of machine.

XQ. 20. Entirely? A. Yes, sir.

XQ. 21. You have never examined any other machine in practical operation?

A. So far as practical operation goes.

XQ. 22. And your testimony as to the practicability of any machine other than the Strain type, as you have testified to, is solely from what you have concluded from a reading of the patents, is that correct?

A. And my general knowledge of mechanics. I would like to explain here that by the Strain type I include the H. K. Miller and the Parker machines as being of the same type.

XQ. 23. When you say your knowledge of machinery, you except therefrom any knowledge of machinery relating to fruit sizers of other than the Strain type, is that correct?

A. I do not understand your question.

Mr. ACKER.—Read his previous answer. I think it was drawn by your previous answer.

Previous answer of witness read by reporter.

A. As far as concerns having seen machines in

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actual operation, yes.

XQ. 24. What practical knowledge have you of machinery, Mr. Knight? [715]

A. The only practical connection I have had with machinery in the way of manufacture has been during the several years I was with the General Electric Company at Lynn, Massachusetts and Schenectady, New York in the manufacture of electrical machines.

XQ. 25. Were you personally engaged in the manufacture of such machinery as mechanic?

A. Not as mechanic but as one of the examiners in the testing department, testing the machinery and supplies.

XQ. 26. Can you state from your inspection of the Strain machine as you have examined it at the various packing-houses at what rate of speed or approximately the revolutions per minute of the rollers? A. No, sir.

XQ. 27. Then, I understand you to say that your testimony on that point is based upon merely glancing at the operation of these rolls?

A. No, it was more than glancing. I examined them quite at length but I did not attempt to count the number of revolutions.

XQ. 28. Is the Strain sizer what is known as a rope and roller sizer? A. Yes, sir.

XQ. 29. I understood you to testify that Mr. Stebler was present at the time of your inspection of the sizers at the various packing-houses you have testified to, which inspection was made June 12th, 1912?

(Deposition of Arthur P. Knight.)

A. Except at Pomona. At the other two he was present.

XQ. 20. Did Mr. Stebler hold any conversation with you [716] regarding the action of these various sizers in connection with the run of fruit through them with the drive belts on and with the drive belts off of the rollers?

A. I can't remember that we had any special conversation on the subject, no. The investigations were made personally on my own account, but to the best of my recollection we did mention some of the features of the machines in talking it over during the trip.

XQ. 21. And discussed the operation of the parts?

A. Yes, sir.

XQ. 22. And likewise the operation of the parts involved in the Parker machine? A. Yes, sir.

XQ. 23. In answer to one of your direct questions, in describing the operation of the roll, that is the direction of its rotation, you stated that it was partly due to the oblique rotation of the fruit, and I will ask you to explain somewhat more definitely what you mean by the oblique rotation of the fruit.

A. The movement of the rope or belt is, of course, in a longitudinal direction and the only possible movement of the rollers is in a transverse plane. If the fruit were rotating only in a vertical plane extending longitudinally of the machine, it would not be capable of imparting a transverse rotation to the rollers unless the point of contact of the roller was above or below the center of the fruit. In that

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case the friction would cause an oblique rotation and this oblique rotation [717] around an axis which makes an angle with the axes of rollers would be sufficient to cause a transverse rotation.

XQ. 24. Would the shape of the fruit have any effect on the rotation of the rolls? A. Yes, sir.

XQ. 25. To what extent would the fruit which is perfectly round vary the movement of the rolls relative to fruit of irregular shape.

A. I did not investigate this point by experiment but offhand I would say that fruit of the irregular shape would produce a spasmodic movement. In every instance that I watched there was a rotation and it was in the direction which I stated.

XQ. 26. Is it your understanding that the patent in suit is confined to the sizing of oranges?

A. No, sir.

XQ. 27. It is for the sizing of fruits of all kinds including nuts, is it not? A. Yes, sir.

XQ. 28. Directing your attention, Mr. Knight, to the Hutchins patent number 456,094, I will ask you to state what constitutes the run-way for the fruit in said device.

A. It consists of a series of grading elements, each element consisting of the belt "f" on one side and the roller "2" on the other side.

XQ. 29. Does the Hutchins patent disclose what you have termed a rope and roller sizer, and when I use the [718] expression "rope and roller," let me say that I include the belt as being the equivalent of the rope.

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A. Yes, it is a rope and roller sizer in a sense.

XQ. 30. What do you mean by the qualification of your answer?

A. For the reason that a single rope does not serve for the conveying and sizing operation of a series of grading elements along the run-way, but separate ropes are used for the successive elements.

XQ. 31. Would it be a fair statement to say that the rope and roller sizer dates from as early as July, 1891? A. The intrinsic principle, yes.

XQ. 32. I believe you have testified that you have been connected with the examining corps of the Patent Office? A. As an Assistant Examiner.

XQ. 33. As an Assistant Examiner of the Patent Office, would you term the Hutchins device a rope and roller sizer?

A. It would be so classified.

XQ. 34. How many grades of fruit are taken care of in the Hutchins device? A. Three.

XQ. 35. Are the rotating elements or grading rollers of the Hutchins device adjustable toward and from the traveling members of the run-way?

A. Yes, sir.

XQ. 36. Are the rolls adjustable independently of one [719] another A. Yes, sir.

XQ. 37. The Hutchins device then discloses independent and individual adjustment of the grading rollers? A. Yes, sir.

XQ. 38. How are these rolls suspended?

A. They are journaled in horizontally adjustable hangers.

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XQ. 39. Might you properly term these hangers bearings or bearing brackets? A. Yes, sir.

XQ. 40. And these bearing brackets are adjustable? A. Yes, sir.

XQ. 41. And does the adjustment of the rollers move the same toward and from the propelling rope to vary the apertures for the escape of fruit?

A. Yes, sir.

XQ. 42. Does the Hutchins patent disclose a plurality of independently adjustable grading rolls which are movable toward and from the propelling means of the run-way? A. Yes, sir.

XQ. 43. In the Hutchins device, as I understand your testimony, and from the patent, the grading members are arranged one above the other, is that correct? A. Yes, sir.

XQ. 44. And in the complainant's machine the grading rolls are arranged end-to-end in longitudinal alignment, is that correct?

A. End-to-end but not exactly in longitudinal alignment.

XQ. 45. They would be in longitudinal alignment unless [720] they are adjusted to produce a graduated run-way, would they not? A. Quite so.

XQ. 46. Does the adjustment of one grading roll in the Hutchins device vary the position of any other grading roll? A. No, sir.

XQ. 47. Is it not a fact that the adjustment given the individual grading rolls of the Hutchins device is substantially the same as the adjustment given the grading rolls of the patent in suit?

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A. The effect is not the same.

XQ. 48. I did not ask about the effect, Mr. Knight. Please read the question.

Question read by reporter.

A. The adjustment is the same.

XQ. 49. Can you state what was the extent of the fruit industry in the year 1891? A. No, sir.

XQ. 50. You have no knowledge one way or the other on that point? A. No, sir.

XQ. 51. Is it a correct statement that the Hutchins device discloses a grader or sizer wherein the independent adjustment of the various grading members may be produced without varying the position of any other grading unit? A. Yes, sir.

XQ. 52. Is it not a fact that the fruit which passes [721] one grading member of the device of the patent in suit has to travel or traverse all other grading members of the grader or sizer until it reaches an aperture sufficient to permit it to escape from the sizer? A. Yes, sir.

XQ. 53. What reason had you for making the statement in your direct testimony that the Hutchins device is not adapted for the grading of oranges?

A. In the first place the rollers are provided with ribs which would be out of the question with oranges. In the second place, the arrangement of the successive grading elements one above the other and causing the fruit to pass successively between the members of each grading element for nine or ten different sizes, would in my opinion, damage the fruit even if the rollers were not ribbed.

(Deposition of Arthur P. Knight.)

XQ. 54. Does not the ungraded fruit in the sizer of the patent in suit have to pass successively through grading elements until it reaches a point of escape? A. Not through; no.

XQ. 55. Or between?

A. Yes, between in a manner which does not create any injurious pressure.

XQ. 56. Have you any foundation for your statement that the Hutchins device would not be adapted for sizing of oranges other than your theoretical opinion on that subject?

A. Only that I have been in a number of packing-houses [722] and have never seen one of them in use for the purpose.

XQ. 57. You mean during what time?

A. Oh, within the last two years.

XQ. 58. But you did not examine any of the machines in use during the year 1891? A. No, sir.

XQ. 59. Is it your understanding of the patent in suit that the sizing or grading rollers must be of uniform diameter, by which I mean each roll of uniform diameter? A. Throughout its length?

XQ. 60. Throughout its length? A. No, sir.

XQ. 61. A service of end-to-end stepped rolls would fall within the patented device, would it not?

A. Each roller being stepped?

XQ. 62. Yes, sir. A. Not in my opinion.

XQ. 63. Then, if I provide a series of end-to-end rollers as one member of the fruit run-way and step the said rollers, it is your idea that it would not fall within the terms of the patent in suit, is that correct?

(Deposition of Arthur P. Knight.)

Mr. LYON.—Objected to as a question directed to a question of law and not to a question of fact and as to a hypothetical construction not shown to have ever existed.

A. I could not pass on that question until some Court, [723] having authority to, should pass upon the exact meaning of the word “rollers” in this case.

XQ. 64. Independent of any decision of a Court, on said point, I will ask you to give an answer based on your observation of the patent in suit.

Mr. LYON.—The objection is repeated and the further objection is urged that it is not the proper subject of expert testimony. Expert testimony is for the purpose of explaining mechanical constructions and comparisons thereof and not for the purpose of determining by the mouth of an expert the scope of a patent, which is the province of the Court. A further objection is urged to the question, that it is indefinite and uncertain, as it does not contain a whole combination sufficient to make an operative grading or sizing machine or to illustrate the mode of operation of such machine or the construction of the parts.

A. As a matter of opinion, I would say that the terms of at least one of the claims would be sufficient to include such a construction. The meaning and scope of this claim would depend upon the specifications, drawings and prior state of the art and the question would arise whether such a construction, with a plurality of sections of different size to each

(Deposition of Arthur P. Knight.)

roll, but with the different rollers independently adjustable so that each roll could be adjusted to and from the main other members of the grader without affecting in any way the adjacent roll, would be the same as with rollers [724] each roller of uniform size throughout its length. I should say, as a matter of opinion, that such a stepped construction of each roll would embody the principle of the Strain patent partially but not perfectly, as, without putting myself in the place of the Court, I could conceive that the Court might hold it to come under the principle of the Strain patent or it might not.

XQ. 65. Do you find anything in the specifications of the patent in suit that restricts or limits the sizing rolls to be of uniform diameter throughout their length?

A. On page 2, lines 13 to 16, Strain states: "By having short grade rollers separately adjustable very fine grading can be done and more than one roller may be adjusted to the same grade if desired," and on page 1 lines 60 to 64, Strain states, "there are as many bins as there are grade rollers." Both of these statements indicate to my mind that it was the intention to have a single roller for each grade and these rollers would be of uniform diameter throughout.

XQ. 66. What is your understanding of the language which you have read from the specifications contained between lines 13 and 16 on page 2 of the specifications?

A. My understanding of this language is that two

(Deposition of Arthur P. Knight.)

adjacent rollers, for example, may be adjusted at the same distance from the opposite member of the grade-way. That is, for instance, rollers number one and [725] number two could be adjusted to the same grade of fruit.

XQ. 67. And if you adjusted number one and number two to the same grade of fruit that would necessitate cutting out one grade, would it not?

A. Keeping the same number of rollers on the machine, yes.

XQ. 68. And is such your understanding of the language contained between the lines to which your attention has been directed? A. Yes, sir.

By consent the taking of the depositions was at this point continued until two o'clock P. M. of the same day.

At two o'clock P. M. of the same date, at the same place and with those persons present as noted at the beginning of these depositions, the following proceedings were had:

ARTHUR P. KNIGHT, a witness produced on behalf of complainant, was recalled for further cross-examination, and testified as follows, to wit:

Cross-examination (Con.).

(By Mr. ACKER.)

XQ. 69. In order that the record may be clear, Mr. Knight, you understand that my questions regarding the Hutchins patent referred to the patent number [726] 456,092. There are two Hutchins patents and we want to clear the record.

(Deposition of Arthur P. Knight.)

A. Yes, sir.

XQ. 70. Directing your attention, Mr. Knight, to Defendant's Exhibit "Ish Patent," number 458,422, I will ask whether or not the machine therein disclosed is what is known as a rope and roller sizer, the same being the Ish patent of August 25, 1891?

A. Yes, sir.

XQ. 71. In the Ish device the rotating or revolving grading member is formed as a stepped roller, is it not? A. Yes, sir.

XQ. 72. And in the Ish device the grading sections of the roller are parallel with the traveling member of the grader or sizer, is that correct?

A. Yes, sir.

XQ. 73. And in the Ish device each grading section of the revolving member is in substantially longitudinal alignment, is that correct?

A. Yes, sir.

XQ. 74. To that extent it differs from the revolving grading members of the Hutchins device, is that true? A. Yes, sir.

XQ. 75. How would you describe the rotating member of the Ish device, or of the device of the Ish patent?

A. I know of no better way to describe it than in the terms of the patent, which states that it is [727] "a rotary member consisting of a graduated cylindrical body or roller which is mounted in suitable bearings."

XQ. 76. Are the bearings in which the graduated cylindrical roller is mounted adjustable?

(Deposition of Arthur P. Knight.)

A. No, sir.

XQ. 77. That is not adjustable one way or the other? A. No, sir.

XQ. 78. There are no provisions made in the Ish patent number 458,422 for adjustment of the graduated roller, is that correct? A. I find none.

XQ. 79. And it is your understanding that a machine built under the Ish patent would be a machine positively fixed so far as the bearings of the grading units are concerned, is that correct?

A. The word "under" is ambiguous here. It might be subservient to the Ish patent but departing considerably from the Ish patent. A machine constructed according to the specifications of the Ish patent would not provide for any such adjustment.

XQ. 80. If I should place another roll of similar structure to that disclosed by the Ish device at the end of the roll which appears in the drawing of the device, would I then have two rollers end-to-end?

A. Yes, sir, but the machine would then be inoperative.

XQ. 81. In other words, the fact that the roll is stepped does not in any manner change your definition of the word "roll," does it?

A. No, sir. [728]

XQ. 82. I will ask you to take patent number 671,646, granted Bailey August 9, 1901, and I will ask you whether that patent discloses a fruit grader, or what has been commonly termed throughout this present testimony, a sizer, having apertures for the escape of the fruit to be graded?

(Deposition of Arthur P. Knight.)

Mr. LYON.—This question and all questions asked the witness in regard to the Bailey patent will be understood as subject to the objection made to the offer of the Bailey patent in evidence, to wit, that it is not a part of the prior art.

Mr. ACKER.—I understand such an objection has been made to the introduction of the Bailey patent but I do not recognize the validity of the objection in any manner whatever.

A. Yes, sir.

XQ. 83. Are these apertures controlled in any manner so as to regulate the opening for the fruit to be sized? A. Yes, sir.

XQ. 84. Does the Bailey device disclose a fruit sizer provided with a plurality of controlled apertures for the fruit to be sized? A. Yes, sir.

XQ. 85. Does the Bailey device disclose a fruit grader one member of which is composed of a series of controlled apertures and rollers in each aperture.

A. I could hardly call the aperture a positive element but for each grading element there is a roller.
[729]

XQ. 86. Are the rollers arranged end-to-end?

A. In a sense, yes.

XQ. 87. Are the rollers of any one grade unit independently adjustable toward and from the propelling member of the grader?

A. Yes, sir, that is ambiguous. Do you mean independently with respect to the other rollers of the same element?

XQ. 88. No, independent of the roller of an ad-

(Deposition of Arthur P. Knight.)

jacent or other grading unit. A. Yes, sir.

XQ. 89. And that adjustment is independent of each other, that is to say, I can adjust one of the grade units carrying the rotating members without disturbing the position of the other?

A. Yes, sir.

XQ. 90. How are the end-to-end rollers of one grade unit carried?

A. By roller I take it you mean the discs "12," which are mounted on the curved shafts or rods "11."

XQ. 91. That is correct.

A. These shafts are carried by plates which are mounted so as to be vertically adjustable on the machine.

XQ. 92. Would it be proper to designate that plate which you have termed "a plate," as a supporting bracket for the rotatable member?

A. The plate together with the portion which extends outwardly therefrom and carries the shaft "11" might be termed a bracket. [730]

XQ. 93. Does the device disclose any guides for the bracket, or the equivalent of the guides?

A. The slots "9" in the plates, together with the thumb screws "10," may be regarded as guides.

XQ. 94. The series of disks sustained and supported by any one of the bracket plates, taken as a whole, constitutes a rotating member for that grading unit, do they not?

A. I would not call it a rotating member. It consists of rotating members.

(Deposition of Arthur P. Knight.)

XQ. 94. If any one roll of the series of rolls utilized in the Strain patent were divided into a plurality of sections would the subdivision of the same remove it from within the sphere of a roll?

A. I would not call it a roll, I would call it a series of rolls.

XQ. 95. Then, in that case you would call each rotating grading member to be comprised of a plurality of rolls? A. That is it.

XQ. 96. Can I correctly so designate the rotating member of each guide unit of the Bailey patent?

A. I should think so.

XQ. 97. And would you consider the rolls of the respective grading members of the Bailey device as being end-to-end rolls?

A. Yes, sir, if you take it referring to the several disks on one end.

XQ. 98. If the rolls of the patent in suit, take for [731] instance the first roll, was subdivided into twelve sections, it would still come within the term of end-to-end rollers, would it not?

A. I should think so.

XQ. 99. In other words, the multiplicity of sections going to make up any one roll would not divert from it being a roll within the meaning and the purposes and functions to be carried out by the patent in suit, would it?

A. Not if they are all strung along in a straight line.

XQ. 100. That is it would only be necessary that the sections of any one grading member be in the

(Deposition of Arthur P. Knight.)

same line and of the same diameter? A. Yes.

XQ. 101. And such is the case with the rotating members of each grade section of the Bailey device, is it not?

A. No, sir, they are on a curved line.

XQ. 102. But does the fact that they are on a curved line remove them from being end-to-end?

A. No, sir.

XQ. 103. From your knowledge of the prior art and your experience as an Examiner in the Patent Office, would you or would you not consider that the fruit sizing industry was a well-filled field at the time of the filing of the application for the reissue patent in suit?

Mr. LYON.—Objected to as incompetent, irrelevant and [732] immaterial.

A. I can't say that I would.

XQ. 104. How many rollers would it require to form a rotating member of a fruit sizer of end-to-end rollers?

Mr. LYON.—The question is objected to as indefinite, and uncertain and ambiguous.

Mr. ACKER.—I would suggest for the benefit of counsel for complainant that he wait until the witness expresses any doubt or indefiniteness as to a question, because what may be indefinite to counsel it does not necessarily follow that it would be indefinite to the witness.

Mr. LYON.—The fact remains, however, that a fruit grader is not composed solely of one or more rollers and we are not here dealing with simply a

(Deposition of Arthur P. Knight.)

series of end-to-end rollers but with two combination claims and it is elementary law that there is no particular novelty in the separate elements of these claims and it has been repeatedly held that such a combination claim cannot be anticipated piecemeal or by a process of combination or reorganization of the devices of the prior art for the purpose of picking out one element of the prior art here and there another, and thus building up an anticipation of the patent in suit solely for the purpose of a mental and theoretical anticipation and such a proceeding is not judging the invention by what actually existed prior thereto but is the same in force and effect as the interpolation [733] in the testimony of any witness of matter to which he has not testified. If counsel desires to be fair either to his subject matter or his witness, he will include sufficient in his question to make an operative combination so that the witness will then be able to judge as to the constructions and operations of the devices.

Mr. ACKER.—I desire to thank counsel for the statement he has made and I presume the Court is fully aware of the elementary principles which he has and the only purpose I can see for the dissertation he has given is to instruct the witness.

Mr. LYON.—It might be well for counsel for the defendants to consider the decisions of this Court and the Circuit Court of Appeals in the cases of Los Alamitas Sugar Company vs. Carroll and Parker vs. Stebler in this connection.

Mr. ACKER.—I again thank counsel for calling

(Deposition of Arthur P. Knight.)

attention to well-known decisions and which the Court is doubtless familiar with.

A. I should say that one roller would serve for the rotating member.

XQ. 105. One roller in your opinion would constitute a series of end-to-end rollers?

A. That was not the question.

Mr. ACKER.—I beg your pardon; I think it was. I will ask the stenographer to read the question.

XQ. 104. Read by the reporter.

A. It would only require one roller to form a rotating member of a fruit sizer having end-to-end rollers. [734]

XQ. 106. What do you understand by the expression “a series of end-to-end rollers”?

A. I understand a plurality of rollers arranged end-to-end, that is to say endwise of one another rather than sidewise or critically.

XQ. 107. And two rollers would answer the term “a series of end-to-end rollers”?

A. Yes, sir, in the terms.

Mr. ACKER.—That is all, Mr. Lyon.

Redirect Examination.

(By Mr. LYON.)

RDQ. 1. Referring, Mr. Knight, to Defendant's Exhibit “Bailey Patent,” point out in the drawing of this patent, or in the description, any belt longitudinally moving the length of the machine and forming one side of the fruit run-way.

A. I find no such element.

RDQ. 2. In your experience as one of the corps

(Deposition of Arthur P. Knight.)

of examiners of the United States Patent Office, in accordance with the interpretation of the patent laws as there interpreted, would you say that an inventor presenting to the Patent Office a claim for a combination in a fruit grader in which there was called for a longitudinally and horizontally moving belt as one member of the run-way and a plurality of rollers as the other side of the run-way, would be rejected as anticipated by the device of the defendant's exhibit "Bailey Patent"? [735]

Mr. ACKER.—Objected to as incompetent, irrelevant and immaterial as it has not been shown that Mr. Knight ever had anything to do in the Patent Office as an Examiner in charge or as an Assistant Examiner in the division having charge of this class of machinery.

A. I do not think that it would.

RDQ. 3. I notice in your cross-examination you made some differentiation between straight line alignment of rolls and the curved line arrangement of the disks in Defendant's Exhibit "Bailey Patent." Will you explain a little more fully what this line of differentiation is?

A. If the shaft "11" carrying the disks "12" in the Bailey patent were straightened out, it would then be an arrangement in which a plurality of rollers are mounted end to end along a straight line and if the disks were all of exactly the same size and were finished, they would present a smooth surface, which might act substantially the same as a single roll, but with a curved shaft the disks must necessarily be

(Deposition of Arthur P. Knight.)

separated somewhat at their outer edges, for the reason that even if they are in contact at their inner edges the curvature of the shaft will throw their outer edges out of contact. This will leave the edges of the disks "12" so that they no longer form a perfectly continuous surface. Of course the distance is small compared to the size of the fruit and the fruit would run over the surface of the disks, but I do not see how it could help being cut in the operation, especially [736] as the disks would have to be made of some material sufficiently strong and hard to stand considerable wear.

RDQ. 4. Referring, now, to Defendant's Exhibit "Hutchins Patent" Number 456,092, how many run-ways are shown in the drawing of this patent?

A. Two.

RDQ. 5. How many belts or ropes or longitudinally moving devices?

A. Well, I should say, it being a double machine to make two to six sizes, and the rope, of course, or in this case the belt, is formed double, so that there are really two conveying belts, one above the other.

RDQ. 6. And in the Defendant's Exhibit "Hutchins Patent," you do not find a single run-way having a plurality of grading apertures, do you?

A. No, sir.

RDQ. 7. If it were attempted to build an orange grading or sizing machine after the construction illustrated and described in Defendant's Exhibit "Hutchins Patent," several run-ways for the several grades would be arranged one above the other, would

(Deposition of Arthur P. Knight.)

they? A. Yes, sir.

RDQ. 8. And I understand there are ordinarily either nine or ten grades of fruit provided for in an orange grading or sizing machine, is that correct?

A. In the machines I have seen there are.

RDQ. 9. Now, in the device built in accordance with Defendant's Exhibit "Hutchins Patent," which size of [737] fruit would be first separated?

A. The largest size would be first separated.

RDQ. 10. And what would become of the smaller sizes that were passing onto the upper grade-way?

A. If the size of them corresponded to the second grade-way, it would fall on the incline H' or into the space at the end of that incline and pass on to the next roller and belt and then backward to the second discharge. If it was fruit of the smallest size, it would, on dropping on the incline H' or dropping through the grade slot beyond the lower end of the first grading roller, it would drop through the second slot out onto the incline at the bottom of the machine.

RDQ. 11. What would the result of such dropping effectuate in the practical use of machinery for separating oranges according to size?

A. In any delicate fruit, such as oranges, it would be extremely injurious to the skin of the orange.

RDQ. 12. And what effect would such injurious effect on the skin of the orange have?

A. It would tend to promote decay.

RDQ. 13. Some insinuations have been made by counsel for defendants as to your knowledge of oranges and I will now ask you if your testimony

(Deposition of Arthur P. Knight.)

that you have just given in regard to the injury of the skin of the orange and thereby causing decay is within your personal knowledge of the subject?
[738]

Mr. ACKER.—I object to the use of the word “insinuation,” as made use of in the last question.

Mr. LYON.—The word is not used in any derogatory or insulting sense, but in the same sense that counsel for defendants has asserted or insisted a lack of experience in this art to the witness.

A. In regard to the skin of the orange being delicate, I speak from actual experience, and as for the effect of the abrasion of the skin of oranges, I will say that it is a well-known fact.

RDQ. 14. On June 12th, 1912, you first visited packing-houses where?

A. Pomona, Uplands and Riverside.

RDQ. 15. In the Pomona packing-houses or house, either one of them, did you see any of the defendant's or Parker machines in operation?

A. Yes, sir.

RDQ. 16. At Uplands, did you see any of the Parker machines in operation?

A. I can't say that I did.

RDQ. 17. Did you at Riverside, California?

A. Yes, sir.

RDQ. 18. In any of these packing-houses, did they have in use both the defendant's or Parker machine and the Stebler or device of the patent in suit?

A. Yes, sir, at some of the packing-houses they had both of them, but I could not say that both of

(Deposition of Arthur P. Knight.)

them were in operation at the same time.

Mr. LYON.—That is all. [739]

Recross-examination.

(By Mr. ACKER.)

RCQ. 1. What is the purpose of the longitudinally traveling rope in the patent in suit?

A. It has a twofold purpose, first to convey the fruit along the grade-way so as to present it to the successive grading sections, and second to form one wall of each grading section.

RCQ. 2. Would not any traveling or propelling member serve the same function?

A. I cannot say as to that.

RCQ. 3. The main function of the traveling rope working in the groove of the nonmovable guide of the patent in suit is to propel the fruit through the grade-way, is it not?

A. You mean along the grade-way?

RCQ. 4. Yes.

A. I can't say that that is the main function. It would be useless without the further function of presenting the fruit to the successive grading sections.

RCQ. 5. Any traveling means that supported the fruit and propelled it along the grade-way would serve the same function, would it not?

A. Not necessarily. It might be of such an impractical nature that it would not perform the function.

RCQ. 6. Do you find any means in Claim 10 of the reissue of the letters patent in suit of a belt forming one member of the run-way?

(Deposition of Arthur P. Knight.)

Mr. LYON.—Objected to as incompetent, being an inquiry [740] directed to subject matter as to which it is the province of the Court to determine and not the proper subject of expert testimony, there being no ambiguity in the claim and therefore incompetent. A. Not in so many words.

RCQ. 7. You find no mention of a belt, do you?

Mr. LYON.—The same objection.

A. Not by name.

RCQ. 8. Do the specifications of the patent in suit state how many sizes or grades of fruit are to be taken care of? A. Yes, sir.

RCQ. 9. Where? A. Page 1, lines 81 and 82.

RCQ. 10. That is in connection with the function of orange grading? A. Yes, sir.

RCQ. 11. Do you find that it is restricted to nine grades? A. No, sir, not necessarily.

RCQ. 12. Would you consider a machine constructed exactly in accordance with the device of the patent in suit which embodied only three rolls arranged as therein shown and described, as being within the terms of the patent?

Mr. LYON.—Objected to as incompetent, being addressed to subject matter as to which *is it* the province of the Court to determine and not the proper subject of expert testimony. [741]

A. Yes, sir.

Mr. ACKER.—I believe that is all, Mr. Lyon.

Mr. LYON.—That is all.

**[Deposition of Fred Stebler, for Complainant
(Recalled).]**

FRED STEBLER, being recalled as a witness in his own behalf, testified as follows, to wit:

Direct Examination.

(By Mr. LYON.)

Q. 1. Mr. Stebler, you testified that you are familiar with Defendant's Exhibit Hutchins Patent, being letters patent number 456,092. I will ask you if you have ever seen in use anywhere in the grading of any kind of device, a machine built in substantial accordance with the description and drawing of this patent? A. No, sir, I never have.

Q. 2. Have you ever heard of such a machine being used? A. No, sir.

Q. 3. Based upon your experience of the past twenty-three years, are you able to state whether such a machine would be a practical machine for grading or separating oranges as to their size?

A. In my opinion it would not be practical.

Q. 4. What reason have you for such opinion?

A. Well, first of all the use of bins in connection with the use of an orange grader is imperative, and so far back as I am acquainted with the orange industry they [742] have always used them, due to the fact that ordinarily a machine is required to make from nine to twelve sizes of oranges. To construct one of these machines to make this number of sizes and direct them to suitable bins from which they could be packed would be utterly impractical,

(Deposition of Fred Stebler.)

for the reason that first of all the machine would have to be made correspondingly high, in so much as there is a positive drop required to make each and every size of fruit. This drop between the grading elements in the machine to make even nine sizes would aggregate eight or ten feet. Fruit being fed into the top of the machine, of course, the largest sizes would be immediately carried off into a bin, the remaining eight or nine sizes would tend to drop through the machine and bounce and pound on the various grading elements until they reached the bottom of the machine, and it is evident to anyone at all familiar with the constituents of any ordinary delicate fruit that this would be very detrimental to the appearance or carrying quality of the fruit after it was subject to this process. Then, again, there is the question of getting the sized fruit as it comes from this machine directed to the bins to enable the required number of packers to get at it. There is no means shown here in this patent for doing this, and it is obvious to anyone familiar with the orange-packing industry that this would be a serious problem.

Q. 5. You say that since 1905 you have owned the patent, Complainant's Exhibit "Rayburn Overhead System Patent," [743] and that the devices of this patent have been discontinued practically from use. Can you give us the reason for that?

A. The chief and real reason for the discontinuance of this Rayburn overhead system was due to the difficulty of getting the fruit down from the sizer

(Deposition of Fred Stebler.)

overhead to the bins below. It was found practically impossible to do this without the fruit suffering such injury as I have mentioned in connection with the Hutchins patent. And of late years it has become to be realized that oranges must not be bumped or bruised by dropping or rolling them around if the grower or packer of them wishes to get full value for them on sending them to market, and it is for this reason that the use of such devices that have tended to cause bruising or injury have been discontinued.

Q. 6. Mr. Knight was asked on cross-examination what portion of the run-way of an orange grading or sizing machine requires the most delicate adjustment. What have you to say in regard to this?

A. The only way I can answer that question would be to say the rotating element of the run-way, as a whole.

Q. 7. Well, is there any one particular portion of the rotating element of the run-way for any given one or two of the grades which requires greater attention than the others? A. No, sir.

Q. 8. You have heard Mr. Knight's criticism of the [744] operation of a device built in accordance with defendant's exhibit "Bailey Patent," have you not? A. Yes, sir.

Q. 9. State whether or not you agree with him and if you differ with him, give your reasons.

A. I agree with him that the machine constructed in accordance with the Bailey patent would be impractical both from the standpoint of the injury to

(Deposition of Fred Stebler.)

the fruit and the action it would have on the fruit.

Mr. LYON.—That is all.

Cross-examination.

(By Mr. ACKER.)

XQ. 1. Into how many grades are nuts separated, Mr. Stebler?

A. Well, I can answer that question first indirectly by saying that I don't know the number of sizes any kind of nuts are graded into. You have not stated what kind of nuts you refer to and I only know of one kind of nuts that are graded for size and that is walnuts.

XQ. 2. How are they graded?

A. On a machine.

XQ. 3. Into what sizes are they graded?

A. I don't know that.

XQ. 4. How are potatoes graded as to size?

A. I never yet saw potatoes graded for size.

XQ. 5. What have you to say concerning vegetables?

A. I have never seen vegetables graded for size.

XQ. 5. Is it not a fact that the Strain patent is [745] taken out as a grader designed to sort fruit, vegetables, such as potatoes, and nuts, into lots of regular sizes?

A. I presume it is a fact that the inventor stated in making application for patent on this machine that for any such purpose it could be applied to, it was to apply, it might apply.

XQ. 6. Is it not a fact that the patentee stated that the machine related to that class of graders de-

(Deposition of Fred Stebler.)

signed for the assorting of fruit, vegetables, such as potatoes, and nuts, into lots of different sizes and that the object of the invention was to provide a machine for that purpose?

A. I believe the specifications so state.

XQ. 7. Is it not a fact that the Hutchins patent was taken out as a sorting machine for fruits and vegetables?

A. His specifications state that it is for fruit and vegetables; yes.

XQ. 8. Have you ever manufactured, sold and had placed into use a machine built exactly in accordance with the machine of the Strain reissue patent in suit without any other appliances thereon?

Mr. LYON.—The question is objected to as indefinite and uncertain as to what is intended by the term “exactly in accordance with the machine of the Strain reissue patent in suit.”

A. Possibly not exactly in all details.

XQ. 9. In what respects did you differ, Mr. Stebler?

A. Possibly some difference in the manner of mounting [746] and adjusting the rollers.

XQ. 10. And how about the distribution of the fruit?

A. Well, this drawing of this patent does not refer to a manner of distribution of the fruit; it is as to the manner of sizing it.

XQ. 11. So I understand. How about so far as it relates to the conveying of the graded fruit to the bins? Were the machines constructed in accord-

(Deposition of Fred Stebler.)

ance with the device illustrated and described by this patent? A. Practically, so; yes.

XQ. 12. What do you mean by "practically so," the qualification?

A. Well, I stated in my last answer that I never followed it in detail.

XQ. 13. How far does the fruit fall after passing through between the grading rollers of the machine constructed in accordance with the patent in suit?

A. Never more than ten inches.

XQ. 14. How far would it fall in a machine constructed in accordance with the Hutchins patent, number 456,092?

A. As I stated awhile ago, when you come to make nine or ten sizes, some of it is apt to fall from eight to ten feet.

XQ. 15. Why?

A. Because it would start from the top and fall to the bottom.

XQ. 16. Does it not move from the first incline onto the second grading unit? [747]

A. Yes, and in the case of the next larger size it will possibly stay there and be carried on to the end of the machine, but in the case of the smaller sizes, it immediately drops through to the next grading element.

XQ. 17. And upon the incline?

A. Yes; on to an incline and strikes every one on its way down.

XQ. 18. You were asked what you had to say in regard to the Hutchins patent, based on your twenty-

(Deposition of Fred Stebler.)

three years' experience. Do I understand that you have been engaged in connection with the orange industry for twenty-three years? A. No, sir.

XQ. 19. How long have you been?

A. Thirteen years.

XQ. 20. Since 1899? A. Yes, sir.

XQ. 20. So your remarks as applicable to the Hutchins machine were not based on an experience of twenty-three years in the orange industry?

A. No, sir.

Mr. ACKER.—That is all, Mr. Lyon.

Redirect Examination.

(By Mr. LYON.)

RDQ. 1. Do you know, Mr. Stebler, in what pursuit Robert Strain was engaged when he made the invention of the patent in suit?

Mr. ACKER.—Objected to as incompetent, irrelevant and [748] immaterial, as it would have no bearing upon the purposes of the patented device and the patent speaks for itself in connection with that subject.

A. He was engaged in the pursuit of packing oranges.

RDQ. 2. Where? A. At Fullerton.

Mr. LYON.—That is all.

By consent the taking of the depositions was at this point continued until ten o'clock A. M. of Thursday, June 21, 1912.

On Thursday, June 21st, 1912, at the same place and with those persons present as noted at the beginning of these depositions, and at the hour of ten o'clock A. M. of said day, the following proceedings were had, to wit:

[Deposition of M. R. Whiffin, for Complainant.]

M. R. WHIFFIN, a witness produced on behalf of complainant, being first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. LYON.)

Q. 1. Please state your name, age, residence and occupation.

A. M. R. Whiffin; my age is forty-three years; occupation is superintendent of packing-houses, [749] Arlington, Riverside County, California.

Q. 2. What packing-houses are you superintendent of? A. I am superintendent of four.

Q. 3. Where?

A. Two situated at Arlington station at an orange and lemon house there and the same at Prenda under the same company, known as the Arlington Heights Fruit Company.

Q. 4. You attend here this morning in response to a subpoena served on you to testify? A. Yes, sir.

Q. 5. In the orange packing-house of the Arlington Heights Fruit Company, at Arlington Heights, what kind or kinds of fruit graders are you now using?

(Deposition of M. R. Whiffin.)

A. We are using the Stebler rope and roller grader.

Q. 6. In a general way can you describe that machine?

A. Well, it is, the fruit is carried on a rope and kept revolving by a series of independent rollers.

Q. 7. Each of the rolls is independently adjustable?

Mr. ACKER.—Objected to as leading.

A. Certainly.

Q. 8. Are you familiar with drawings, Mr. Whiffin? A. Not very, I am afraid.

Q. 9. I show you a copy of the patent in suit and call your attention to figure 1, and ask you to look that figure over and state whether or not the machines, so far as the grading devices are concerned are substantially like those shown on this drawing. When I say "the machines," I mean the ones in the packing-house [750] of the Arlington Heights Fruit Company at Arlington Heights, Riverside County, California.

A. It is practically the same thing.

Q. 10. Those machines were purchased from Fred Stebler of the California Iron Works of Riverside, California? A. Yes, sir.

Q. 11. Prior to using that machine, or those machines, had you used any other kind of machine?

A. We had used the old rope and roller, which was afterwards changed to this independent rope and roller.

Q. 12. Did that old rope and roller grader have

(Deposition of M. R. Whiffin.)

any particular name?

A. I think it was called the "All California" grader.

Q. 13. What kind of a roller did they have?

A. It was a roller probably five feet long with a graduated scale on it.

Q. 14. In other words, it was a stepped roller?

A. It was a stepped roller; yes, sir.

Q. 15. What was the reason, Mr. Whiffin, for changing from the California grader to the grader you have just referred to?

A. Because it was not practical in the sizing of our fruit.

Q. 16. In what respect was it not practical?

A. Because you could not set any independent size of roller.

Q. 17. Is the setting of each size of roller or grade, then, a desirable feature in the grading or sizing of oranges? [751]

A. Absolutely, more so now, because the eastern buyers insist on it.

Q. 18. That feature is particularly desirable in order to keep a uniformity of pack, is it?

A. Certainly.

Q. 19. And how long have you used this Stebler machine with the independent adjustment of each roller? A. This is our fourth season.

(At this point Mr. James W. Stevenson entered the room where these depositions are being taken and at the request of counsel for defendants is directed to retire out of the room and out of the hear-

(Deposition of M. R. Whiffin.)

ing of the testimony of the witness, and did so.)

Q. 20. I believe you stated, Mr. Whiffin, that these independently adjustable rollers of the Stebler machine that you have are rotated by means of belts?

A. Yes, sir.

Mr. ACKER.—The witness did not so state, but we will consider that as a fact.

Q. 21. What is the object, Mr. Whiffin, of using the belts to drive these rollers?

A. So that the revolution of the rollers will make it easier on the fruit. Oranges being a very delicate fruit, every care has to be taken so as not to injure them.

Q. 22. And what would injury of that kind to the orange cause? A. Decay.

Q. 23. Then, if I understand you correctly, in the packing [752] and handling of fruit it is absolutely necessary that every precaution be taken to prevent bruising or injuring the rind of the orange?

A. Certainly.

Q. 24. Have you ever had any experience with this Stebler grader in the use of any of the rollers with the belts off the rollers? A. Yes, sir.

Q. 25. To what extent?

A. At some times the belts will break and then the rollers stop revolving sometimes. Shall I go on and explain?

Q. 26. Go on, explain it in full.

A. Sometimes we do it, sometimes we don't, but the fruit keeps on going just the same.

Q. 27. When you say "the fruit keeps on going

(Deposition of M. R. Whiffin.)

just the same," do you mean that it does not clog in the run-way? A. I have never seen it.

Q. 28. You mean you have never seen it clog?

A. I have never seen it clog.

Q. 28. Have you ever noticed what the action of the fruit in passing by such a roller with the belt off is? A. I have noticed it; yes.

Q. 30. What is it?

A. Often the rope will carry the fruit over the dead roller, and if not, the following oranges will follow one another.

Q. 30. And does the roller remain stationary?
[753]

A. In such cases I have seen it often revolve.

Q. 31. In what direction did it revolve?

A. Outwardly.

Q. 32. That would be the same way as the rollers revolve when the belts are on?

A. In the ordinary way.

Q. 33. As the rollers *ordinary* rotate with the belts on? A. Yes, sir.

Q. 34. Based on your experience, then, would you say that it was practical to use such Stebler grader without the cross belts? A. No, sir.

Q. 35. Why not?

A. Because as I mentioned before, we have to take every care in the handling of fruit and the revolving of that roller makes it easier on the fruit.

Q. 36. Are you familiar with the Parker grader?

A. Not very.

Q. 37. Have you ever seen one in operation?

(Deposition of M. R. Whiffin.)

A. I have seen it operating; yes.

Q. 38. The rollers of that grader are not rotated?

A. No, sir.

Q. 39. I mean by belts?

A. No, sir, stationary.

Q. 40. From your experience can you state whether or not the same danger exists of pinching or bruising the fruit by the rolls in the Parker grader that would be if the rollers in the Stebler grader were not positively [754] driven?

Mr. ACKER.—The question is objected to on the ground that the witness has positively stated that he is not familiar with the Parker device, is not familiar with the character of its working or the working of his machine, and therefore testimony given by the witness is not based on his knowledge, and as leading.

A. I think that it is only fair to say that that was the objection I had in not buying it, just my own idea. I have watched them several times, but I will say right here that I have never seen them pinch an orange.

Q. 41. Do the rolls in the Parker grader remain stationary or do they revolve when the oranges are carried on to them by the belt?

Mr. ACKER.—Same objection.

A. When the orange rests on the roll the roller revolves.

Q. 42. And in what direction? A. Outwardly.

Q. 43. But you do not believe from your experience that a grader is as practical and commercially

(Deposition of M. R. Whiffin.)

utilizable where the rollers are not positively driven as where they are positively driven? A. No, sir.

Q. 44. In other words, that is your personal preference? A. Certainly; yes, sir.

Q. 45. In your investigation of the Parker grader were [755] there any other reasons than the non-driving of the Parker rollers why you did not purchase such machine?

A. My idea was that the sizing of the fruit was not so perfect as the rope and roller.

Q. 46. And why was that, in your opinion?

A. Because the rope traveling faster will revolve the orange and give it its size on every side of the orange.

Q. 47. You have referred to the fact that the Stebler graders which you have are provided with means for adjusting each roller so as to independently adjust each grade or size? A. Yes, sir.

Q. 48. Is that a matter which is often utilized in grading oranges?

A. Depends upon the kind of fruit. In some localities, where the fruit does not run even in size or shape, you may say, it is very often adjusted running different kinds of fruit, Jaffas, Malta Bloods, Valencias, we often had to change.

Q. 49. In considering the purchase of the Parker machines by you, as you have heretofore referred to, did you take into consideration the question of capacity of the Stebler machine and the capacity of the Parker machine at all? A. Yes, sir.

(Deposition of M. R. Whiffin.)

Q. 50. And what did you conclude in regard thereto?

A. I concluded that the Stebler had a larger capacity than the Parker.

Mr. LYON.—You may inquire, Mr. Acker.
[756]

Cross-examination.

(By Mr. ACKER.)

XQ. 1. During any given run of fruit, Mr. Whiffin, how often do you change the grader? Suppose you were grading various oranges for a week or ten days, how often would you change the grader?

A. In our own case, as the fruit is raised in one locality it is fairly evenly shaped—now, for instance, we will take for yesterday's run, we were running Valencias and we changed twice.

XQ. 2. How much fruit did you run yesterday?

A. We ran probably two thousand boxes.

XQ. 3. As long as the fruit is of substantially the same character do you make many adjustments of the graders? A. No, not if the fruit is the same.

XQ. 4. You stated that you had used, prior to the Stebler device, or the device of the patent in suit, which we have been terming the Stebler device, the California grader, and I will ask you to look at the drawing of the patent number 458,422 and state if that is the type of grader you had reference to.

A. That is the one; yes, sir.

XQ. 6. It has five steps on the roller?

A. Some had five and I think they went from three to five, if I remember rightly.

(Deposition of M. R. Whiffin.)

XQ. 7. As I understand, you stated that at times you would notice that a belt had broken, a drive belt, and when your attention was directed to the broken [757] belt, or you observed a broken belt, did you repair it? A. Yes, sir.

XQ. 8. And would do so at once?

A. We wouldn't if we were just at the point of a clean-up, but we would as a rule, would fix it, repair it.

XQ. 9. I believe I understood you to testify that the main objection you had to the Parker devices when you were looking into it was the fact that his rollers were not positively driven rollers?

A. Yes, and it seemed to me a little hard on the fruit.

XQ. 10. What would have been your impression if the Stebler device had been presented to you without any means for positively driving the rolls?

A. I would not have bought it.

XQ. 11. Then, you would consider it an impractical device?

A. Yes, impractical. Yes, I will say impractical.

Mr. ACKER.—That is all, Mr. Lyon.

Redirect Examination.

(By Mr. LYON.)

RDQ. 1. I neglected to ask you, Mr. Whiffin, if you were present at the packing-house at Arlington Heights on Wednesday, June 12th, 1912, and there met Mr. Stebler, Mr. Arthur P. Knight and myself?

A. Yes, sir.

RDQ. 2. At that time you showed us the Stebler

(Deposition of M. R. Whiffin.)

machines, did you not? A. Yes, sir. [758]

RDQ. 3. And at that time you took off one of the belts off of one or more of the rolls to show us the action of the grader in practical use without the belt? A. Yes, sir.

RDQ. 4. And your testimony in regard to the action of the rollers with the belt removed that you have heretofore given, that the fruit would rotate the rollers as it went along, was borne out by this demonstration on that day as well? A. Yes, sir.

RDQ. 5. Would you consider the Parker machine or the Stebler machine the most practical machine without either of them having means for positively rotating the rollers?

A. That is an impossible question to answer, Mr. Lyon, without seeing it and without trying it. They are practically the same thing, one is horizontal, the other perpendicular. Now, if one works horizontally, why won't the other work the same perpendicularly?

RDQ. 6. In other words, then, you see no difference between them without the belts?

A. Only the size, that is all.

RDQ. 7. In size, in what way?

A. Well, the rollers of the Parker are so much smaller.

Mr. LYON.—That is all.

Recross-examination.

(By Mr. ACKER.) [759]

RCQ. 1. Have you ever seen or tried a Strain or Stebler device of the character of the one in suit with

(Deposition of M. R. Whiffin.)

all the drive belts removed? A. No, sir.

RCQ. 2. You made mention of the fact that the rope in the Stebler or Strain device appealed to you in drawing a comparison between such device and the Parker device, and I will ask you to explain a little more definitely just what you meant.

A. With the rope and roller—if I had a model here I could explain it to you much better—but the rope traveling at a certain speed is revolving the orange round and round and the roller is keeping it eased up without injury to the fruit. Yet, when it comes to a certain size or certain bin it has turned through every form of that orange to get its exact size. Do you follow me?

Mr. ACKER.—I follow you.

RCQ. 3. And what was there in that feature that impressed you over the propelling feature of the Parker device?

A. Because it is not revolving as far as I could see.

RCQ. 4. In the Parker device?

A. In the Parker device. It is carried on the small belt to the rollers from the largest part to the smallest part and we do not get the rotation.

Mr. ACKER.—That is all.

Mr. LYON.—That is all. [760]

**[Deposition of James W. Stevenson, for
Complainant.]**

JAMES W. STEVENSON, a witness produced on behalf of complainant, being first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified as follows, to wit:

(Deposition of James W. Stevenson.)

Direct Examination.

(By Mr. LYON.)

Q. 1. Please state your name, age, residence and occupation.

A. Well, James W. Stevenson; Riverside, California; I am fifty-two years old. I am working at carpenter work at present. I have been working packing-house machinery.

Q. 2. How long, Mr. Stevenson, were you engaged in the packing-house machinery business, either for yourself or others?

A. Well, it has been a little more than six years since I first worked for the California Iron Works.

Q. 3. California Iron Works of Riverside?

A. Yes, sir.

Q. 4. When you first went to work for that concern the partnership was Fred Stebler and Austin

A. Gamble? A. Yes, sir.

Q. 5. And after that Mr. Stebler succeeded to the firm, did he? A. Yes, sir.

Q. 6. And where did you work for them? I mean generally, what localities?

A. At Prenda packing-houses of the Arlington Heights Fruit Company. [761]

Q. 7. And elsewhere?

A. Well, at Victoria Avenue Citrus Association, at Casa Blanca—I don't know the name of the firm—and at Colton I put in some machinery for them.

Q. 8. You were foreman on those jobs?

A. Part of the time I was.

(Deposition of James W. Stevenson.)

Q. 9. What machines was it that you were installing?

A. They were the same machine he makes now with the big belt distributing system.

Q. 10. Fruit-grading machines? A. Yes.

Q. 11. How was the run-way in those machines formed?

A. Well, it was between a rope and a set of rollers, set of adjustable rollers.

Q. 12. By "adjustable rollers," what do you mean, Mr. Stevenson?

A. Well, that was to move the rollers either way to make the sizes larger or smaller.

Q. 13. Was it necessary to move more than one roller at a time or could each roller be separately moved toward and from the belt?

Mr. ACKER.—The question is objected to as leading.

A. Well, they could be adjusted as it was necessary to make the size right, as I understood it.

Q. 14. Well, what I meant was whether in the machines which you installed for the California Iron Works, was the mechanical construction such as to permit the adjustment of each roller separately or would such mechanical construction require the adjustment of more [762] than one roller at the same time?

A. You could adjust each roller separately.

Q. 15. Were the rollers positively driven?

Mr. ACKER.—The question is objected to as leading.

(Deposition of James W. Stevenson.)

A. Yes, sir.

Q. 16. By what means?

A. Well, there was a small shaft and a small separate belt from the shaft to each roll.

Q. 17. And in what direction were the rollers rotated?

A. The rollers rotated largely by gravity of the fruit.

Q. 18. That would be outwardly from the belt?

A. Yes, sir; outwardly from the belt.

Q. 19. Did you ever see any of these machines in commercial operation?

A. Oh, yes, a good many of them.

Q. 20. Do you know anything as to the requisite or nonrequirement of individually adjusting the several sizes in grading oranges?

A. I don't know that I quite get your question.

Q. 21. The question is directed as to whether you know whether there is or is not, in the commercial sizing or grading of oranges, any necessity or advantage in having each sizing aperture of the grader separately adjustable.

A. Yes, it is necessary to have them separately adjustable, I think.

Q. 22. Why?

A. Well, sometimes, of course, a certain size runs a [763] little too large or a little too small and oftentimes you find it necessary to change one size to make it pack right.

Q. 23. Do you know whether with the graders of the type that you put in for the California Iron

(Deposition of James W. Stevenson.)

Works such separate adjustment was used by the users of such machines?

A. Yes, it was used by their machine altogether.

Q. 24. Frequently, or infrequently?

A. Altogether.

Q. 25. You mean by "altogether," that it was often necessary to make such adjustment?

Mr. ACKER.—The question is objected to as leading.

A. Oh, it is quite often necessary to change the adjustment, because fruit sometimes is more round than others and the difference in the shape of the fruit sometimes makes a little difference in the way it packs up.

Q. 26. Did you ever see one of these California graders of the construction which you have referred to as having installed, used without the drive belts on the rollers?

Mr. ACKER.—I will ask counsel to explain what is meant by the term "California grader."

Mr. LYON.—Put in the California Iron Works graders.

Mr. ACKER.—I will ask counsel to explain whether he means by the term "California Iron Works graders," the grader of the patent in suit?

Mr. LYON.—I do, and it is understood that was what the witness testified he has put in for the Prenda and [764] other packing-houses.

Q. 27. Now, the question is, did you ever see any of these machines used without the use of the belts for driving the individual rollers?

(Deposition of James W. Stevenson.)

A. I never did but once, and that was when one of the little belts was broke.

Q. 28. Was the machine in use at that time?

A. The machine was in use; yes.

Q. 29. And how long did the belt remain broken?

A. Oh, probably half a day, until the next day. I had to get a new belt you know. I fixed it the next morning.

Q. 30. Do you know whether they shut down the machine or continued to operate it that day?

A. No, they did not shut it down.

Q. 31. What was the result in the grading?

A. I don't know that there was any difference. Of course, the fruit would travel slower over that roller than it would over the others.

Q. 32. Would the roller remain stationary?

A. It would turn once in awhile.

Q. 33. What roller was that in the machine?

A. I think about middle way. Possibly nearest the large sizes.

Q. 34. Was the fruit at that time running more to large or small sizes?

A. Well, I couldn't say as to that, but about the usual size.

Q. 35. You are familiar with the Parker grader like [765] those in the Riverside Heights Orange Growers' Association's packing-house at Riverside?

A. I saw those, yes.

Q. 36. Have you ever watched the rollers in that machine when they were grading oranges?

A. Yes, sir.

(Deposition of James W. Stevenson.)

Q. 37. Did the rollers in that machine remain stationary?

A. Oh, no, not when the fruit was running on them they didn't.

Q. 38. What was their action when the fruit was running on them?

A. Why, they would turn as the fruit went by.

Q. 39. In what direction?

A. They would turn the same direction, against the fruit.

Q. 40. You mean the same direction as the California Iron Works grader? A. Yes, sir.

Q. 41. Did you ever manufacture any graders of your own, Mr. Stevenson? A. I did.

Q. 42. Did you ever build any machine in which a belt was used as the longitudinally moving member for carrying the fruit along and rollers or rotating parts were not used on the opposite side of the runway but a stationary or nonmoving member used in place thereof?

A. Yes, that is the way I first made my machine. While the grade-way was adjustable, it did not rotate, it [766] was stationary—just a stationary rod.

Q. 43. I show you a photograph and ask you what this is a photograph of?

A. That is a photograph of the first machine I made.

Q. 44. This truly represents that machine?

A. That is just as it was, exactly.

Q. 45. The grading rods that you have just re-

(Deposition of James W. Stevenson.)

ferred to are located where?

A. Just near the outer edge of the belt.

Q. 46. And that was adjustable substantially vertically? A. Yes.

Q. 47. But it did not rotate or move otherwise?

A. No.

Q. 48. What was the result of the use of this particular machine, Mr. Stevenson?

A. Well, it would pinch the fruit; that is to say, when the fruit would roll against that stationary rod it would try to go under before it came to a place where there was quite room enough, and the consequence was that it would push the belt into the center and sometimes would force the belt high up in the center until the fruit would get off the run-way.

Q. 49. Where was this first machine installed?

A. In the Worthley and Strong packing-house at Riverside.

Q. 50. Was it accepted in the condition and construction shown in this photograph?

A. No, that was not accepted.

Q. 51. Was it afterwards accepted? [767]

A. Not until I put in a revolving shaft in there in place of the grade rod—stationary.

Q. 52. And in what direction did the shaft revolve?

A. The shaft revolved against the fruit, the same as the rollers in the other machines.

Q. 53. And what effect did the change from this nonrotating or nonmoving grading rod to the rotating rod make in the machine?

(Deposition of James W. Stevenson.)

A. That made a satisfactory machine, and they paid me for it.

Q. 54. Are you acquainted with George D. Parker, of Riverside, California, who is now present in the room? A. I am.

Q. 55. While you were working on this first machine did you have any conversation with Mr. Parker relative thereto? A. Yes, sir.

Q. 56. What was that conversation?

A. Well, I don't know that I can recall in any words, only that I was at his shop and I at that time inquired for Mr. Hewitt, and Parker answered me that he had bought that plant and he was working on an orange grader at the same time, and I told him about this machine of mine (referring to Complainant's Exhibit "Stevenson's Machine"). That is the way I had it at the time.

Q. 57. Well, after that conversation did you show him this machine? A. Yes, sir. [768]

Q. 58. And was there any conversation with regard to the stationary grading rods at that time?

A. Why, Mr. Parker tried to convince me that it would pinch fruit, and I did not believe that it would. I thought it was all right.

Q. 59. Why did he say that it would pinch fruit?

A. I don't know that he gave me the reason why. I don't think he did.

Q. 60. Was there any conversation with regard to using anything else instead of the stationary grading rods?

Mr. ACKER.—The question is objected to as lead-

(Deposition of James W. Stevenson.)

ing in the extreme, and I suggest that the witness be instructed to tell the result of the conversation without its being dragged out of him piecemeal.

Q. 61. In view of the objection, I will ask you, Mr. Stevenson, to give us all of the conversation that you remember.

A. Well, we took a box of fruit and run through the machine and I could not give the conversation, as I know of, but we talked about it and he said he thought it would pinch fruit, and I think he suggested putting a roller in place of the stationary rod.

Q. 62. Did you make any reply to such suggestion?

Mr. ACKER.—Same objection.

A. I think I said that I did not see how we could put a roller in there without interfering with Stebler's California Iron Works patent.

Q. 63. At that time, or thereafter, did you have any business dealings with Mr. Parker in regard to that [769] sizer?

A. Well, we talked at the time about he manufacturing these machines provided we got it completed and he said that he thought he could help me out on it.

Q. 64. Was that suggestion ever followed out in any manner?

A. Well, I told him about what I was willing to do, that I was willing to work for him for wages and he might pay me about twenty-five per cent of the profit as royalty on the machine, and that seemed satisfactory with him and me too, but I didn't get that

(Deposition of James W. Stevenson.)

machine completed, you know, and there was considerable delay, and I went to work on a little different line and he went to work on a different line so we did not have any more dealings together on the grader.

Q. 65. You say that at the time you went to this shop and inquired for Mr. Hewitt that Mr. Parker told you he had bought the shop, that he, Mr. Parker, was working on a grader? A. Yes, sir.

Q. 66. Do you know what kind of a grader it was?

A. Well, I don't know. It was a set of rolls; the rollers traveled in an endless chain in some way or other and the rolls came wider apart at each size and there was cross-belts that would take each size away as they dropped through.

Q. 67. Was this conversation prior to his having installed, so far as you know, any of the graders of the type that were installed in the packing-house of the [770] Riverside Heights Orange Growers' Association?

A. There wasn't any installed at that time, for there was none anywhere that I know of.

Mr. LYON.—You may inquire, Mr. Acker.

Cross-examination.

(By Mr. ACKER.)

XQ. 1. When did you work for the California Iron Works, Mr. Stevenson?

A. Well, as near as I can tell it was a little over six years ago I would say. It would be six years last March.

XQ. 2. That would be about 1906?

(Deposition of James W. Stevenson.)

A. Along about 1906. It would be 1905, possibly.

XQ. 3. Your familiarity with the use of grading or sizing machines dates from your experience with the California Iron Works?

A. That was my first experience. I hardly had ever seen an orange sizer before.

XQ. 4. And was it from your experience with the California Iron Works that you date your knowledge as to the value of the rotation of the roll in connection with the sizer?

A. No, I don't, not then. I didn't at the time see the necessity of that roll then. Of course, that was my first experience.

XQ. 5. When does your knowledge as to the value of the rotating of the rolls date? [771]

A. Oh, I never got the real value of that idea until after I tried this, you see, this stationary rod. (Referring to Complainant's Exhibit "Stevenson Machine.") I learned from that that it was necessary to have the rotation there.

XQ. 6. And when does that date from?

A. That, let me see, that has been, this makes the third year that has been in use.

XQ. 7. That would be 1908 about, approximately?

A. Yes.

XQ. 8. You testified that in connection with the machine installed for the Arlington Heights Fruit Company that you noticed at one time that a drive belt broke, that is one of the belts for rotating the rolls?

A. No, it was not at that place. It was at the

(Deposition of James W. Stevenson.)

Victoria Avenue at Casa Blanca.

XQ. 9. That was one of the machines that was installed for the California Iron Works?

A. Yes, it was one of their machines.

XQ. 10. And when was that?

A. That was about a year later.

XQ. 11. One year later? A. Yes, five years ago.

XQ. 12. About 1906? A. 1906, yes.

XQ. 13. I understood from your testimony, you did not become familiar with the value, if any, of the rotation of the rolls until after you tried out the device represented by this photograph exhibit? (Referring [772] to Complainant's Exhibit "Photo of Stevenson Machine.")

A. When that circumstance happened I thought I had learned something, that it was not necessary to turn the rollers.

XQ. 14. Then, in 1906, the value of imparting rotation to the rolls was not apparent to you, was it?

A. Well, I don't know whether I understand you correctly or not.

XQ. 15. You said it was not until after you tried using the device, until after you tried using the machine of the photograph, Complainant's Exhibit "Stevenson Machine," that you became familiar with the value of the rotation of the rollers?

A. Yes.

XQ. 16. And prior to that you did not appreciate the value of rotating the rollers?

A. No, sir, I thought it was not necessary.

XQ. 17. When was this photograph taken, do you

(Deposition of James W. Stevenson.)

know, of the Complainant's Exhibit "Stevenson Machine"?

A. This photograph here was taken, let's see, it was taken four years ago.

XQ. 18. Four years ago? That would be about 1908? A. No, 1908, I think.

XQ. 19. Did you give this photograph to Mr. Stebler, the complainant in the present action?

A. Yes.

XQ. 20. How long after the machine was built was the photograph taken? [773]

A. Oh, I couldn't say, possibly a couple of weeks.

XQ. 21. Still during the year 1907?

A. Yes, it was very close to the time it was built.

XQ. 22. Do you know when Mr. Parker purchased the iron works of which he is now the proprietor at the present time, the Parker Machine Works?

A. I couldn't give any date; no. The way I happened to think of it was the material I needed in making this machine I bought from Mr. Hewitt, you see. That was before Parker went there. Then when I called for Mr. Hewitt after I was this near, Mr. Parker answered me. I couldn't name any dates. I couldn't remember.

XQ. 23. Mr. Hewitt was the party from whom Mr. Parker purchased the iron works?

A. Yes, he had control there.

XQ. 24. That is Mr. Hewitt had control?

A. Yes.

XQ. 25. Don't you know as a matter of fact that

(Deposition of James W. Stevenson.)

Mr. Parker did not purchase from Mr. Hewitt until the year 1909? A. I don't know about that.

XQ. 26. You have no knowledge one way or the other on that? A. No.

XQ. 27. Under what name was the shop conducted prior to the purchase of the same by Mr. Parker?

A. It was the Riverside Foundry and Machine Works.

XQ. 28. Do you know when its name was changed to Parker Machine Works? [774]

A. No, I don't.

XQ. 29. Did you ever apply for a patent on the device represented by Complainant's Exhibit "Stevenson Machine"?

A. That is the machine, yes; that is that machine that is patented, just as it is.

XQ. 30. You procured a patent on that?

A. Yes.

XQ. 31. In this machine I understand that the member of the run-way opposing the traveling member consists of a series of adjustable nonrotating steps or members? A. Yes.

XQ. 32. And how are these members arranged?

A. They are arranged a good deal in the same position that the rollers are and they are adjustable a good deal the same way.

XQ. 33. Are they continuous throughout the length of the machine?

A. Just one section, one rod for each section and each rod is adjustable just the same as the roller is.

(Deposition of James W. Stevenson.)

XQ. 34. How close are these rods together?

A. You mean between? They are nearly four feet long.

XQ. 35. And how close are they together?

A. The ends come right close together, but don't touch, possibly one-eighth of an inch, just enough for the bearing surfaces. There is a bearing between the two. They don't conflict with one another in changing the sizes for adjustment.

XQ. 36. There is no intervening space between them? A. No, they come right together. [775]

XQ. 37. What do you mean by the grade rods being like the rollers?

A. The arrangement is the same.

XQ. 38. And how about the end-wise arrangement or end-to-end arrangement?

A. They are not adjustable endwise.

XQ. 39. Are they adjustable toward and from the traveling member? A. Yes, sir.

XQ. 40. Practically up and down?

A. Yes, sir.

XQ. 41. And how does the end-wise arrangement of these nonrotating steps compare with the arrangement of the rollers that you testified were driven by the belts?

A. Of course, there is a little more space then; any one pair. There is a double journal, that is, at each end of each roll.

XQ. 42. Otherwise the same, substantially the same arrangement?

(Deposition of James W. Stevenson.)

A. Well, let's see. I don't quite catch you, I guess.

XQ. 43. What I mean is, in this device, Complainant's Exhibit "Stevenson's Machine," as I understand it, the fruit passes from one nonrotating rod right onto another? A. Yes.

XQ. 44. And does the same hold good as to the machines with the adjustable rollers? Does it go from one roll onto another? [776]

A. In this machine I put a little telescope guide in there between the two different sizes. I didn't in this machine. That is a mistake. After I put the roll in the shaft, then I put in a wider belt and put in the telescope guides there, you know, so that I could carry the fruit.

XQ. 45. I am afraid we are at loggerheads. I am inclined to believe that you understand me to mean by the roller, the machine you made after this one. By the roller machine I referred to the machines which you set up for the California Iron Works. How were the rollers in that machine arranged?

A. Are you talking about this machine, "Stevenson Machine"?

XQ. 46. No. How were the rollers in the machine which was installed for the California Iron Works arranged?

A. Well, they were arranged along in the same position as I had this grade rod.

XQ. 47. In the same position as the rod in Complainant's Exhibit "Stevenson Machine"?

(Deposition of James W. Stevenson.)

A. Yes; only they did not extend all the way to the rear end of the machine. He had it also built as a distributing system that carried the fruit to the rear end.

XQ. 48. Up to the point of the distributing system they were arranged the same as the rods in your first machine? A. Yes.

XQ. 49. What change did you make in the machine of [777] Complainant's Exhibit "Stevenson Machine," after you found that the fixed rods or steps tended to pinch the fruit. I say, what change did you make?

A. Well, in the belt carrier underneath, I made that in sections, and I made a difference, that is the depth in each section, of about an eighth of an inch or the difference of one size in the belt underneath. That enabled me to use a straight shaft from there instead of an adjustable set of grade rods or rollers.

XQ. 50. And how did that work?

A. First rate, gave satisfaction.

XQ. 51. Is it still in use?

A. It is in use, yes.

XQ. 52. Did you have any rotating members on that shaft? A. The shaft itself rotated.

XQ. 53. And did it carry inner members of tubular sections?

A. I can't hardly understand what you mean.

XQ. 54. Was the shaft of uniform diameter throughout its length?

A. Throughout, yes, and the bearings were placed with the shaft so that it was a smooth surface so

(Deposition of James W. Stevenson.)

far as the shaft was concerned. It was a smooth surface all right.

XQ. 55. And how did you make changes as to different sizes of fruit?

A. That was by raising and lowering the shaft.

XQ. 56. Bodily? [778] A. Yes.

XQ. 57. And when was that device designed and built by you?

A. It has been in use three seasons.

XQ. 58. Starting would you say with 1908?

A. 1908, yes.

XQ. 59. Did you apply for a patent on that device? A. No.

XQ. 60. Are you still the owner of the patent that was granted on Complainant's Exhibit, "Stevenson Machine"? A. No, sir, I sold that to Mr. Stebler.

XQ. 61. Mr. Stebler present in the room and the proprietor of the California Iron Works?

A. Yes.

XQ. 62. When did you first install any of the machines of the changed type that you changed from the Complainant's Exhibit "Stevenson Machine"?

A. I installed them—well, in fact, I had this one Stevenson machine installed, and I just merely kept on rebuilding it and changing it until I made the new machine out of it and it has been in use three seasons.

XQ. 63. But in 1909 was the first season that you put it into use?

A. 1909? No, it would be 1908 to be ready for last season.

(Deposition of James W. Stevenson.)

XQ. 64. I don't know that I understand quite how you gauge your seasons.

A. Yes, 1909. This season began in 1911. [779]

Mr. LYON.—This is 1912, Mr. Stevenson.

WITNESS.—I am getting mixed on dates, I guess. Of course, I am, as Mr. Lyon says this is 1912.

XQ. 65. And when you say three seasons ago do you mean 1909?

A. That would be 1909, yes, because this season began in 1911, you know. I expect I get dates wrong because I am the poorest hand in the world to remember dates.

XQ. 66. When did you hold the conversation with Mr. Parker that you have testified to in your direct examination?

A. Let me see. I had this machine in use one year and the other three years. Oh, it has been five years ago.

XQ. 67. That would be in 1907? A. 1907.

XQ. 68. Do you think you held this conversation with Mr. Parker prior to his buying out the former proprietor of the Parker Machine Works?

Mr. LYON.—Objected to as indefinite and uncertain to fix a date, inasmuch as the witness has testified that he has no personal knowledge whether Mr. Parker bought out the former proprietor, or when.

A. I don't think so, because the first conversation I had with him I inquired for Mr. Hewitt and he answered that he had bought out that plant.

XQ. 69. You stated that in making a test of the

(Deposition of James W. Stevenson.)

machine illustrated in Complainant's Exhibit "Stevenson Machine," [780] that the fruit pinched and tended to lift the belt up?

A. That is, it pushed up from both sides into the center.

XQ. 70. And some of it escaped?

A. Yes, it raised the center of the belt until the fruit would get clear off.

XQ. 71. Did you ever try a machine with adjustable steps and used in that machine a rope for propelling the fruit through the grade-way?

A. No, I never tried that with a rope.

XQ. 72. You testified on direct examination that the independently adjustable rollers was a matter of importance in the grading of fruit. When did you acquire such knowledge?

A. Did I say that the independent adjustment of the rolls was necessary?

XQ. 73. I don't know whether you said it was necessary or not. I understood you to testify in reply to a direct question that you considered it a feature of importance. Maybe I am mistaken in your testimony on that point.

A. I think you are, because I don't think I said that, because in my machine I could have made the belt adjustable instead of the roller, instead of the shaft, I could do that.

XQ. 74. Then, do I understand you correctly as stating that you do not consider the individual adjustment of the rolls a matter of importance?

A. Well, it is important, but not probably abso-

(Deposition of James W. Stevenson.)

lutely necessary. [781]

XQ. 75. Will you please explain a little more fully just what you mean on that point? I don't quite understand you.

A. Well, you see, the belt or rope could be adjusted instead of the rolls if they wanted to.

XQ. 76. And that would accomplish the same purpose? A. I think so.

XQ. 77. And would produce just as good a machine?

A. It probably would not be as satisfactory.

XQ. 78. Why not?

A. Well, it is handier to adjust the rollers than *it* the belt or rope.

XQ. 79. Does your knowledge of the individual adjustment of the rollers date from your installation of the machine for the Victoria Packing-house?

A. The individual adjustment of the rollers, you say? No, it was from my first experience at the Prenda packing-house.

XQ. 80. And when was that?

A. That was six years ago.

XQ. 81. Have you ever had charge of a packing-house, Mr. Stevenson?

A. Have charge of the running of a packing-house?

XQ. 82. Yes, sir. A. No.

XQ. 83. Have you ever had complete control of the running of the grading machines or sizing machines of the Stebler or Strain type, which were in-

(Deposition of James W. Stevenson.)

stalled in the packing-houses to which you have referred? [782]

A. Nothing more than to start them up and get them in running order.

XQ. 84. Have you ever had complete control of the running of any machine in any packing-house, of the construction of the patent in suit?

A. Only just to get them started so that the packing-house people could go ahead with them.

XQ. 85. Then you would leave them alone?

A. Yes.

XQ. 86. You would have no further care of it?

A. No.

XQ. 87. Are you familiar with the patent in suit or do you know what machine is involved in the patent in suit?

A. I am familiar with the machine; yes.

XQ. 88. Please describe in detail the construction of the rotatable member of the run-way in such machine.

A. Well, they have a rope, there are two ropes down the center possibly three or four inches apart, and on the other side there is a set of adjustable rolls in a horizontal line on either side of the rope that rotates against the fruit, and as the fruit comes on the smaller sizes drop through and each roll is set further back from the rope, enough to make the difference in either size, and so on, until each size gets graded, until the last size comes out.

XQ. 89. Where would the fruit passed over the first roll of the series of rolls go to?

(Deposition of James W. Stevenson.)

A. If it was small enough to go through the first roller, [783] it would drop into the first bin.

XQ. 90. What position does the second roller occupy from the first roller?

A. It is further apart.

XQ. 91. How is it located as to the endwise position?

A. The two rolls come within about three-quarters of an inch of each other.

XQ. 92. And does that hold good as to the arrangement of each roller relative to each other?

A. Yes.

XQ. 93. When the rolls were fixed for the grading of fruit were they what might be termed in a stepped position relative to each other?

A. How is that? Stepped position? Yes.

XQ. 94. And being so stepped it formed a graduated run-way for the fruit? Is that true?

A. Yes.

XQ. 95. What would happen in the grading or sizing of the fruit if the second roll of the series was adjusted to practically the same position relative to the traveling belt as the first roll?

A. Why, you would get the same size in each bin. Not very much in the second bin. You would get most of it in the first.

XQ. 96. Would that cut out one bin, if they were set exactly? In other words, would it cut out one grade of fruit? A. It would cut out one size; yes.

XQ. 97. That would be one grade. When you

(Deposition of James W. Stevenson.)

say "size" [784] that would be one grade, would it not?

A. The grade and the size are two different things. Grade means quality and size means size. It would cut out one size.

XQ. 98. It would cut out one size? A. Yes, sir.

XQ. 98. If the sizer was arranged for nine different sizes of fruit and the rolls were fixed as I have mentioned, you would cut out one size of fruit? Is that correct? A. Yes.

XQ. 100. You stated that during the course of your conversation with Mr. Parker, that you ran a box of fruit through your machine, meaning the machine of the Complainant's Exhibit "Stevenson Machine." In the running of that box of fruit through the machine did you observe any pinching of the fruit?

A. I didn't. I don't think that I said a box of fruit. We just ran fruit through it. I couldn't say whether it was a box or a dozen oranges. We ran some fruit through it. I don't know how much.

XQ. 101. Can you state what led you to dispose of your patent covering the machine of Complainant's Exhibit "Stevenson Machine" to Mr. Stebler?

A. Why, yes. Mr. Stebler came out with another patent that I was apparently infringing on.

XQ. 102. Was that patent you refer to the patent in suit? A. No, it was another patent. [785]

XQ. 103. The patent in suit being the one to which I now direct your attention, Complainant's Exhibit "Reissue Letters Patent in Suit"?

(Deposition of James W. Stevenson.)

A. No, it was not this one.

XQ. 104. Did Mr. Stebler threaten to sue you as an infringer? A. Yes.

XQ. 105. And it was by reason of that fact that you disposed of your patent to him?

A. Yes. I went and got counsel and I decided that I was infringing and I thought it was no use to fight anything when I knew I was wrong.

XQ. 106. That was because you were infringing the patent to which he called your attention?

A. Yes.

XQ. 107. But not the patent in suit? A. No.

XQ. 108. Have you ever invented any other fruit grader other than the one you have testified to?

A. No other fruit sizer, no.

Mr. ACKER.—That is all, Mr. Lyon.

Redirect Examination.

(By Mr. LYON.)

RDQ. 1. When at the Victoria packing-house for this half day's run, this rope and roller grader with the individually adjustable rolls was permitted to continue in operation with one of the belts broken and removed, as you have testified heretofore, did you [786] observe whether the fruit clogged any on the roller where the belt was removed?

Mr. ACKER.—The question is objected to inasmuch as the witness has testified that he did not have control or charge of the running of the fruit through the machine, and did not operate the machine for the sizing of the fruit.

Mr. LYON.—To which objection the reply is made

(Deposition of James W. Stevenson.)

that it must be obvious to anyone that a man being present may observe without having actual control of the machine.

A. I noticed that it would go slower over that roller and sometimes one orange would lie there until another would come against it and then they would both go along together.

RDQ. 2. Did the oranges pile up on that roller?

A. Oh, no.

RDQ. 3. What was your purpose in being out there at that time, Mr. Stevenson?

A. I was putting in a new grader there, a new sizer.

RDQ. 4. I notice you stated in your cross-examination that your recollection as to dates was not good. Are we to understand from that that your *recollection vague* or poor as to the exact time when you had this conversation with Mr. Parker to which you have referred?

A. Well, to give the time of year or even the year and not make a mistake that far back.

RDQ. 5. Is your recollection clear as to the circumstances? [787]

A. Oh, yes. I don't forget circumstances like I do dates.

RDQ. 6. I show you Defendant's Exhibit "Hutchins Patent, being letters patent number 456,092, and ask you if you understand the machine therein shown and described?

Mr. ACKER.—Objected to the question as incompetent, irrelevant and immaterial and on the further

(Deposition of James W. Stevenson.)

ground that it is not proper redirect examination, and on the further ground that there has not been the proper foundation laid for this witness to testify.

Mr. LYON.—If counsel insists on his objection that it is not redirect examination, if that be his objection, we will ask counsel to now conduct any recross-examination which he may desire and we will then recall the witness for further direct examination.

Mr. ACKER.—I have no cross-questions to ask at this time. I have finished my cross-examination of the witness as based on the direct examination.

Mr. LYON.—And on the redirect examination so far as it has gone.

Mr. ACKER.—There has been no redirect examination up to the present time on which I wish to cross-examine the witness.

Mr. LYON.—The witness is then recalled for further direct examination:

JAMES W. STEVENSON, a witness produced on behalf of complainant, being recalled for further examination, [788] testified as follows, to wit:

Direct Examination.

(By Mr. LYON.)

Q. 1. I hand you Defendant's Exhibit "Hutchins Patent," being letters patent number 456,092. Mr. Stevenson, you understand the machine illustrated and described in this patent? A. I think I do.

Q. 2. Based upon your experience in building and your observation of the operation of orange-sizing machines, state whether or not such a machine, as

(Deposition of James W. Stevenson.)

described in said letters patent, would be practical in the sizing of oranges?

A. I don't think it would.

Q. 3. Why not?

A. Well, in the first place, to get the number of sizes there is in oranges, the machine would go so high that it would not be practical to use, too much drop.

Q. 4. What do you mean by "too much drop"?

A. Well, every different size drops down to a lower set of rolls and belt and the distance would be so great that it would not be possible. I don't think it would. I think that has been a sizing machine for apples. They used to make about three different sizes of apples as they barrelled them up in Michigan and Indiana.

Mr. LYON.—We move to strike from the record and exclude from consideration all that portion of the [789] answer following the words "I think," as not responsive to the question and not—

Mr. ACKER.—We object to the exclusion by counsel for complainant of any portion of any answer given by his own witness to his own question.

Q. 5. Did you ever see a machine like that shown in the Defendant's Exhibit "Hutchins Patent"?

A. No, I never did.

Q. 6. Then you have no knowledge as to whether such a machine was ever used or not? A. No, sir.

Mr. LYON.—We renew the motion to exclude.

Mr. LYON.—That is all.

(Deposition of James W. Stevenson.)

Cross-examination.

(By Mr. ACKER.)

XQ. 1. Why do you say that you believe the machine of the Hutchins patent to be a machine for the grading of apples?

A. Because I have seen them. That is, I have not seen the machine, but we could buy apples by the barrel in three different sizes. We could buy the medium or the small or the large size when we would buy a barrel at a time for domestic use.

XQ. 2. How are the grading members of the device of the Hutchins patent arranged?

A. It is apparently between an inclined belt and a roller.

XQ. 3. Is that all the answer? [790]

A. That is all.

XQ. 4. Have you carefully studied the Hutchins patent? A. Not very much.

XQ. 5. What has been the extent of your study of said patent?

A. Oh, I looked it over possibly for an hour or such a matter.

XQ. 6. Have you read the specifications all through? A. Yes.

XQ. 7. And you understand every part of it and the construction?

A. I wouldn't say that I do perfectly, no.

XQ. 8. And your knowledge of the orange industry dates from what year?

A. Of the orange machines, you mean?

XQ. 9. Yes.

(Deposition of James W. Stevenson.)

A. From the time I was at the Prenda packing-house, let me see, that was about '95, the latter part of '95. No, it was not '95, it was 1905.

XQ. 10. 1905?

A. Yes. A little more than six years ago.

XQ. 11. Have you examined *the* read the letters patent in suit? A. No.

XQ. 12. Is it your understanding that the letters patent in suit are confined solely to a machine for the sizing of oranges?

Mr. LYON.—Objected to as incompetent, not cross-examination, the witness not having been interrogated at all [791] as to the letters patent in suit and no foundation laid for any testimony by this witness as to what the patent in suit shows or covers, and further, on the ground that any understanding that this witness may have of said letters patent is incompetent, the question being for the Court to determine and not the witness.

A. I couldn't say about that.

XQ. 13. In connection with the Prenda packing-house, what were your duties?

A. To set up the new machine.

XQ. 14. That is the machine of the California Iron Works?

A. The sizing machine, yes, the grader. We call them graders but really they are sizing machines.

XQ. 15. And is that packing-house where you noticed the sizer in use with one of the belts broken for awhile?

(Deposition of James W. Stevenson.)

A. No, that was at Casa Blanca, Victoria Avenue Association.

XQ. 16. With the belt broken? You mean one of the little belts for driving the grade roller?

A. The little belt; yes.

XQ. 17. Was the carrying belt or the belt for propelling the fruit through the run-way in operation during that time?

A. Yes, the rope belt was running; yes.

XQ. 18. Does the Hutchins patent number 456,092 disclose a grader or sizer having independently adjustable and individually adjustable grading rolls? [792]

A. Why, I couldn't state the adjustment of that machine, but I think they do.

XQ. 19. Does the Hutchins patent illustrate a rope and roller sizer or grader?

A. The Hutchins? No, that is a belt and roller.

XQ. 20. What distinction do you make between a belt and roller grader and a rope and roller grader?

A. I don't see any difference, only one is the round belt and the other is a flat one.

XQ. 21. Then, for all intents and purposes the Hutchins device may be considered as disclosing a rope and roller grader?

A. You couldn't call a rope and a flat belt hardly the same thing.

XQ. 22. Then you would not consider—

A. (Interrupting.) One is a round belt and the other is a flat belt. There is, of course, a good deal of difference between a flat belt, and a round belt.

(Deposition of James W. Stevenson.)

One is a rope and the other a belt.

XQ. 23. What difference in function exists between a rope belt and a flat belt?

A. Well, a rope belt running in a round track is more frequently in a certain position than a flat belt would be.

XQ. 24. Would you consider one to be the equivalent of the other? A. They do the same work.

XQ. 25. And in substantially the same way?

A. Yes, in substantially the same way, I guess.

[793]

Mr. ACKER.—That is all.

Redirect Examination.

(By Mr. LYON.)

RDQ. 1. Mr. Stevenson, in your first machine, as exemplified in Complainant's Exhibit "Stevenson Machine," how was the belt part of the machine constructed? A. The belt part?

RDQ. 2. Yes.

A. Well, the belt carries it in an inclined shape, that is high in the center and low on the side.

RDQ. 3. At the apex of the incline, what did you have?

A. Had a groove and a chain attached to the belt underneath, the chain running in the groove.

RDQ. 4. What was the object of the chain and the groove?

A. Well, I had two objects in view for it: to keep the belt in position, in the right position on the apex, as you call it, and also to make a positive drive so

(Deposition of James W. Stevenson.)

that the belt couldn't slip.

RDQ. 5. How did the chain and groove keep the belt in position?

A. Well, the chain running in the groove and the belt riveted to the chain, would keep it on a center, you know.

RDQ. 6. What was the necessity of such a means for keeping it in position?

A. Well, of course, if it was on an incline that way, [794] if there was nothing to hold it, it would probably work off to one side or the other. Had to have something to keep it in position, on the center.

RDQ. 7. Then, the groove formed a guide for holding the chain in position?

A. Formed a guide for the chain and the chain held the belt.

RDQ. 8. You referred to the Parker machines that are in the Riverside Orange Growers' Association's packing-house. Are these Parker machines provided with the chain and groove at the apex in this same way that we have just referred to?

A. Yes, except that he uses two belts and attached the two edges to the chain, where I only used one.

RDQ. 9. And at the apex there is a groove in which the chain runs? A. Yes.

Mr. LYON.—That is all.

Recross-examination.

(By Mr. ACKER.)

RCQ. 1. How is the belt, or rather the propelling belt, for the fruit in the Hutchins device, patent

(Deposition of James W. Stevenson.)

456,092, arranged, situated and carried?

A. That is the same as I got here, isn't it? (Referring to Defendant's Exhibit "Hutchins Patent.")

Mr. ACKER.—Oh, you have one there.

A. I don't know that I have been able to see what [795] holds that belt in position.

RCQ. 2. Do you mean by that that your study and examination of the patent has not been sufficient to enable you to state?

A. No, I have not studied it thoroughly.

RCQ. 3. Were you familiar with the device of the patent in suit when you designed your machine, Complainant's Exhibit "Stevenson Machine"?

Mr. LYON.—Objected to as not cross-examination. The witness has not been examined with relation to the patent in suit, and this objection will be understood as taken to all questions asked the witness in regard to the patent in suit and notice given to counsel for defendants that by examining the witness with regard to the patent in suit, he is thereby making the witness his own.

Mr. ACKER.—We will leave it for the Court to determine whether the question is properly put to the witness or not in view of the character of the so-called redirect examination of this witness.

A. I never studied that patent at all, just the machine.

RCQ. 4. You understood the machine?

A. I understood the machine but not the patent.

RCQ. 5. You understood the machine to be a patented device?

(Deposition of James W. Stevenson.)

A. Oh, yes, I understood it was patented.

RCQ. 6. Were you familiar with the fact that in that machine the propelling rope travelled within a groove [796] or a nonmovable agent?

A. Yes.

RCQ. 7. Was it your aim in designing your machine to keep as clear away from the patented machine as you could? A. Yes.

RCQ. 8. Did you consider when you placed a drive chain in the groove at the apex of the nonmovable guide and united to that chain your propelling belt for the fruit that you were making the same form of a drive device and the seating for the drive device as in the patent in suit?

A. I didn't think anything about that; no.

RCQ. 9. Did you consider it to be the same form of a drive means?

Mr. LYON.—Objected to on the ground that the witness has already stated that he did not consider the question at all.

A. No, I never thought anything about it at all.

RCQ. 10. And after you got the machine assembled and in working order, did you consider your form of device to be the same as the form of device in the chain drive as the machine of the patent in suit?

Mr. LYON.—Objected to as not cross-examination, the witness not having been interrogated at all as to the patent in suit, and on the further ground that it is incompetent, for the reason that the witness has testified that he has never seen the patent in suit

(Deposition of James W. Stevenson.)

and is not familiar therewith. [797]

A. I just supposed that I was altogether clear of that.

RCQ. 11. And in designing your machine it was your endeavor to provide a different form of drive and arrangement of drive to that of the machine which you had installed for the California Iron Works as you have testified to, is that correct?

A. I was trying to get everything different and original and clear of it or any other.

RCQ. 12. And you considered your arrangement of the drive chain propeller and belt to be a different form, did you not? A. Yes, I did.

Mr. ACKER.—That is all.

Re-redirect Examination.

(By Mr. LYON.)

RRDQ. 1. You were subpoenaed to testify in this case and subpoena served on you, were you not?

A. Yes.

Re-recross-examination.

(By Mr. ACKER.)

RRCQ. 1. Then, Mr. Stevenson, did you object to giving testimony in this suit? A. Oh, no.

RRCQ. 2. Did Mr. Stebler ask you whether you would testify in this suit?

A. Why, he asked me some questions, yes. [798]

RRCQ. 3. What were the character of the questions he asked you, Mr. Stevenson?

A. Well, let me see. He asked me about when I first built this grader (referring to Complainant's Exhibit "Stevenson Machine"), and he asked me

(Deposition of James W. Stevenson.)

whether I had ever shown it to Mr. Parker or not and when and where.

RRCQ. 4. And did he ask you whether you would appear and testify in his behalf? A. No.

RRCQ. 5. Was it necessary to serve a subpoena on you to get you to testify in this case?

A. He did say that he might have to take me to Los Angeles.

RRCQ. 6. You were willing to and would have appeared voluntarily, would you not?

A. I don't think I would because I had business at home.

RRCQ. 7. Other than having other business to attend to of your own you would have been willing to come and testify in this suit?

A. Oh, I had other business here to-day.

RRCQ. 8. And you would have been perfectly willing to have appeared here to-day without a subpoena?

A. Yes. I would have had to come here sometime, so that it did not make any difference.

RRCQ. 9. In other words, Mr. Stevenson, all I am trying to ascertain is that it was not necessary for Mr. Stebler to exercise the authority of the Court to get you to testify. *You would have testified without*

— [799]

* * * * *

[Complainant's Exhibit "Switzer Letter."]

F. A. Powell, President.
R. H. Maclay, Vice-President.

G. W. Switzer, Secretary.
C. D. Hubbard, Representative.
R. P. Waite,
H. P. Canby,
Executive Committee.

FERNANDO FRUIT GROWERS' ASSOCIA-
TION.

(Cut)

(Cut)

San Fernando, Cal., Oct. 4th, 1911. 191—

H. C. Harding, Manager.

Mr. Stebler,

Riverside, Cal.

Dear Sir:—

We are desirous of installing one of the Stebler sizers in our packing house. We have been using one of the New Parker sizers in our house but find that it will not handle the amount of fruit that a Stebler sizer will handle and, as our output is increasing steadily each year, we must be equipped with facilities for handling our fruit quickly, and wish therefore to replace our Parker sizer with one of your rope and roller style.

Kindly give us your best terms on one of these sizers, without the bins, and oblige.

Very truly yours,

FERNANDO FRUIT GROWERS ASS'N.

G. W. SWITZER, Secy.

(Endorsed.) [806]

[Complainant's Exhibit "Decision of Board of
Examiners-in-Chief."]

2-390.

UNITED STATES OF AMERICA.
DEPARTMENT OF THE INTERIOR.
UNITED STATES PATENT OFFICE.

To all to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the Records of this Office of the Decision of the Examiners-in-chief, dated October 24, 1904, in the matter of

Interference

Number 23,151.

Rayburn vs. Strain,

Subject-Matter:—

Fruit Graders.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this 12th day of October, in the year of our Lord one thousand nine hundred and ten and of the Independence of the United States of America the one hundred and thirty-fifth.

[Seal]

C. C. BILLINGS,

First Assistant Commissioner of Patents. [807]

Recorded Vol. 31½, p. 72.

E. C. C. Appeal No. 26,006. Paper No. 5.

No. 26,006.

Decision.

U. S. Patent Office, October 24, 1904.

Before the Examiners-in-chief, on Appeal.

In the matter of the Interference between the pat-

ent to Charles Rayburn, No. 726,756, granted April 28, 1903, on an application filed August 18, 1902, and the reissue application of Robert Strain, filed October 21, 1903, reissue of patent No. 730,412, granted June 9, 1903, on an application filed April 28, 1902. Interference No. 23,151.

Improvement in Fruit Graders.

Messrs. JAMES R. ROGERS and JOHN A. SAUL, for Rayburn.

Messrs. TOWNSEND BROS., for Strain.

The issue is:

1. In a fruit sizing machine, a runway for the fruit comprising cooperating parallel members, one of said members consisting of a series of rolls arranged end to end and disposed progressively at different distances from the other member, forming communicating fruit-discharging apertures of progressively different widths along the length of the runway, means for adjusting each roll independently to vary the size of the aperture formed thereby, and means for driving the rolls, substantially as described.
2. In a fruit sizing machine, a supporting frame, a runway for the fruit comprising cooperating parallel members, one of said members consisting of a series of rolls arranged end to end and disposed progressively at different distances from the other member, forming communicating fruit-discharging apertures of progressively different widths along the length of the runway, brackets carrying the rolls, means mounted upon the frame for moving each bracket and ad-

justing each roll independently to vary the size of the aperture formed thereby, and means for driving the rolls, substantially as described.

3. In a fruit sizing machine, the combination with a supporting frame, of a fruit runway formed by a relatively stationary member and a longitudinal series of rolls arranged [808] end to end at different distances from said stationary member, thus providing communicating spaces of progressively varying sizes for the discharge of the fruit, means for independently adjusting the rolls with relation to said stationary member, means for driving the rolls, and means for positively feeding the fruit along the runway, substantially as described.
26,006—2
4. In a fruit grading machine, the combination with a supporting frame, of a fruit runway comprising a relatively stationary member and a series of rolls disposed in parallel relation to said member and arranged end to end at different distances from the stationary member, forming communicating passages of progressively varying sizes along the runway for the discharge of the fruit, means for adjusting the rolls with relation to the stationary member, means for driving said rolls and a travelling belt moving in parallel relation to the stationary member and rolls positively feeding the fruit along the runway, substantially as described.
5. In a fruit grading machine, the combination with a supporting frame, of a central longitudinal

divider, forming one side of each of two parallel runways, a series of rolls disposed on each side of the divider and arranged end to end at different distances from the divider, forming therewith a runway having progressively varying discharge spaces for the fruit, means for adjusting the rolls of each series toward and from the common divider, means for driving the rolls, and belts disposed on opposite sides of the divider for positively feeding the fruit along the runways, substantially as described.

6. In a fruit sizing machine, the combination with a supporting frame, of a longitudinal shaft, transverse shafts, one of which is adapted to be driven from a suitable source of power, a runway comprising a relatively stationary member and an adjustable member consisting of a series of rolls arranged parallel therewith and disposed end to end at different distances from the stationary member, means for independently adjusting the rolls with relation to the stationary member, means for driving the rolls from the longitudinal shaft, and a belt connected with the transverse shafts for positively feeding the fruit along the runway, substantially as set forth.
7. In a fruit grading machine, a runway formed of two parallel members, one of said members consisting of a series of end to end rolls, brackets carrying the rolls, guides for the brackets, and means for adjusting the brackets upon the guides, substantially as set forth.

Motions have been made by each party to suppress

portions of the depositions of the other. It is unnecessary to specifically pass upon these motions.

The examiner of interferences has justly criticized the manner of taking the testimony. Not only were needless and futile objections constantly made, particularly by Rayburn's counsel, who [809] was
26,066—3

himself the greater offender in the matter of leading questions, but the utter disregard of the rules of evidence almost precludes the possibility of arriving at facts upon which to base a satisfactory conclusion of the controversy.

The language of the Court in *Royal Metal Mnfg. Co. v. Hard Metal Works*, 130 Fed. Rep. 778, is applicable here:

“Counsel have vied with each other in padding the record, regardless of the rules of evidence and of their duty to the court.”

The Examiner of Interferences has reviewed at length the testimony in behalf of Rayburn, and it is not necessary here to go into such testimony. We agree with him that it proves no date of invention earlier than the date of his application.

The testimony for Strain shows that he had a definite conception of the invention as early as February, 1901. As he was the first to file an application, he was first to conceive and first to constructively reduce to practice.

Both parties assert that full-sized machines have been built and are in use. Strangely enough none was introduced in evidence, nor were photographs taken, nor was any attempt made to show what they

were except by testimony of witnesses, who were not allowed to describe the machines, but were shown copies of the interference drawings and asked whether the machines were such as were shown in the drawings.

Strain offers an exhibit model of his machine, but it does not appear when it was made or who made it, or that it is an accurate copy of the original machine. Manifestly, even if admissible, it is lacking in evidential value.

Neither party has proved an actual reduction to practice.

The decision of the Examiner of Interferences awarding priority of invention to Robert Strain was clearly right and is affirmed. [810]

26,006—4

Limit of appeal will expire November 23, 1904.

J. H. BRICKENSTEIN,

T. G. STEWARD,

Examiners in Chief.

3rd member absent.

WF.

E. E. G.

[Endorsed]: U. S. Patent Office Copy Made Oct. 11, 1910. 180,886/10. [811]

Riverside Heights O. G. Assn. et al. 783

[Complainant's Exhibit "Parker Patent."]

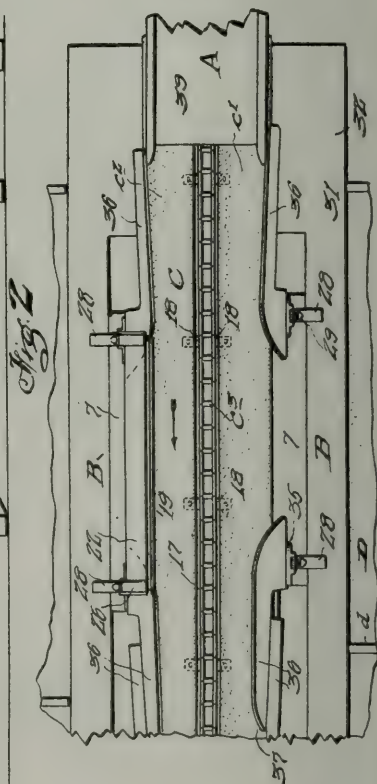
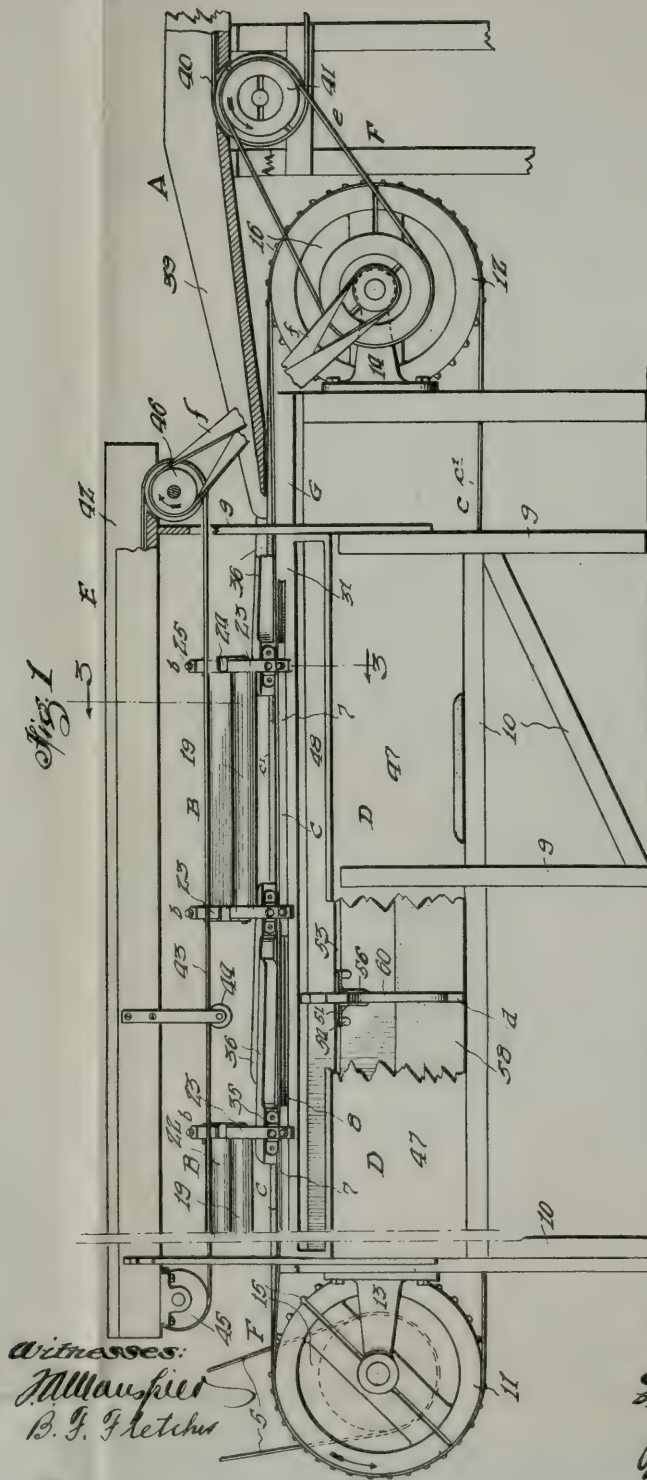
784

G. D. PARKER.
FRUIT SIZER OR GRADER.
APPLICATION FILED MAR. 31, 1910.

997,468.

Patented July 11, 1911.

2 SHEETS-SHEET 1.



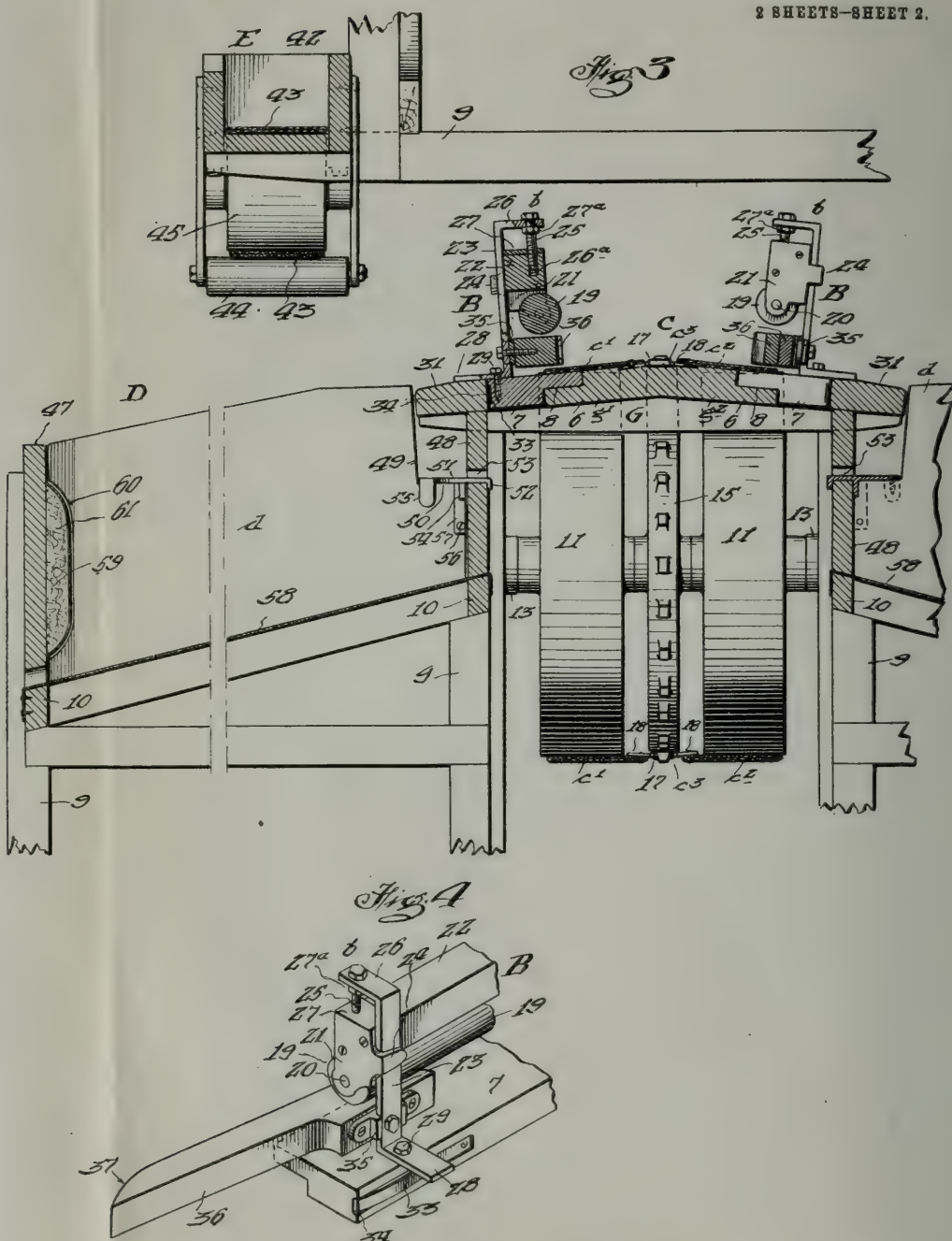
Inventor,
George D. Parker;
Beckett & Blaisdell,
his Attorneys.

G. D. PARKER.
FRUIT SIZER OR GRADER.
APPLICATION FILED MAR. 31, 1910.

997,468.

Patented July 11, 1911.

2 SHEETS—SHEET 2.



Witnesses:

M. A. Fitch
B. F. Fletcher.

Inventor,
George D. Parker;
by *Beckert & Blaisdell*
his Attorneys.

UNITED STATES PATENT OFFICE.

GEORGE D. PARKER, OF RIVERSIDE, CALIFORNIA.

FRUIT SIZER OR GRADER.

997,468.

Specification of Letters Patent.

Patented July 11, 1911.

Application filed March 31, 1910. Serial No. 553,438.

To all whom it may concern:

Be it known that I, GEORGE D. PARKER, a citizen of the United States, residing at Riverside, in the county of Riverside and State of California, have invented new and useful Improvements in Fruit Sizers or Graders, of which the following is a specification.

This invention relates to fruit sizers or graders; and it has for its object to provide improvements in sizers or graders for separating fruit into classes of various sizes and grades, which will be relatively simple and inexpensive in construction, and generally superior in point of positiveness and accuracy of operation, and facility of adjustment of parts and control in operation, and which will also be generally superior in efficiency and serviceability.

With the above general objects in view, the invention consists in the novel provision, construction, formation, combination, association and relative arrangement of parts, members and features, all as hereinafter described, shown in the drawings, and finally pointed out in claims.

In the drawings:—Figure 1 is a longitudinal side elevation, partly in section and partly broken away for clearness of illustration, of a fruit sizer or grader embodying the invention; Fig. 2 is a partial or fragmentary top plan view thereof; Fig. 3 is an enlarged detail transverse sectional view thereof, partly in full lines and partly broken away for clearness of illustration, the same being taken upon the section line 3—3, Fig. 1, looking in the direction of the appended arrows; and, Fig. 4 is a detail isometric view, upon substantially the same scale as that of Fig. 3, and illustrating in a fragmentary manner an essential feature of the invention consisting of an adjustable grading or sizing element.

Corresponding parts in all the figures are denoted by the same reference characters.

Referring with particularity to the drawings, the improved fruit sizer or grader comprises supply means A, sizing or grading members B, and feed means C by which the fruit is conveyed from the supply means to the sizing or grading members whence the fruit passes, in accordance with the sizes thereof, to points of deposit or receptacles such as bins D which, in accordance with the invention, are provided with adjustable side-walls *d* whereby the said bins may be en-

larged or contracted laterally, or longitudinally of the feed means C; and the sizing or grading members B are adjustably mounted to provide for variations of the sizes or grades of fruit of which they respectively permit passage to the bins D. I further provide imperfect fruit conveying means E to which is committed such of the fruit as is found to be unfit for use with the fruit passed to the bins D; and the feed means C, supply means A and conveying means E are jointly actuated by operating means F, the feed means C being primarily actuated from a suitable prime mover or source of power, as by a belt 5. Operative connections *e* and *f* extend respectively from the feed means C to the conveying means E and the supply means A.

The feed means C preferably comprises two jointly operated members c^1 and c^2 which are both connected with a drive member c^3 which co-acts with the operating means F; and said members c^1 and c^2 may each comprise an endless belt, said belts traversing adjacent paths and in their upper courses overlying a table or support G having two lateral portions g^1 and g^2 slightly downwardly inclined in opposite directions, from a horizontal plane; and the sizing or grading members B are arranged in series adjacent to each of the belts c^1 and c^2 , being supported upon adjuncts of the table or support G, which latter preferably consist of longitudinal portions 6, and base plates for the sizing or grading members B, the same being lap-jointed, as at 8. The table or support G is mounted upon suitable uprights 9 which are longitudinally and diagonally braced, as at 10, the supports and braces 9 and 10 being extended laterally to accommodate the bins D which are arranged at each side of the table or support G in a series longitudinally of the apparatus or mechanism.

A preferred form and construction of parts, members and features entering into the embodiment of the invention and the essential features thereof, together with a preferred combination and association thereof, is as follows:—

The endless belts c^1 and c^2 are trained over two pairs of pulleys, 11 and 12, which are suitably journaled, as at 13 and 14 respectively, at the opposite ends of the main frame which includes the uprights 9 and braces 10; and the pulleys of each pair are

spaced apart sufficiently to accommodate a sprocket wheel, 15 and 16 respectively, over and around each of which sprocket wheels is trained an endless link belt 17 which is tied to the flat belts c^1 and c^2 at predetermined intervals, as at 18, insuring joint and equal movement of said flat belts and the intermediate link belt. In the upper courses taken by the flat belts they are brought into parallel relation with and above the said portions g^1 and g^2 of the table G so as to conform to the slight angular relation above described and clearly shown in Fig. 3, wherefrom it results that the fruit conveyed by either flat belt is directed laterally upon the same, by gravity, toward the sizing or grading members B of the series provided for the sorting of the fruit so fed.

Each of the sizing or grading members B comprises a grading roller 19 which is so disposed that its axis of rotation is substantially parallel with the course of travel of the flat belts by means of which the fruit is fed, and each grading roller is disposed partially above one of the flat belts, whereby fruit is directly fed to the respective sizing and grading member by the respective flat belt; and each of the rollers 19 is provided with end bearings 20 journaled in side plates or cheeks 21 of a carriage 22 adjustably mounted upon uprights 23 and maintained in connection therewith by fingers 24 which play vertically or substantially vertically upon the uprights 23; adjusting means b being provided for the regulation of the elevation of each grading roller 19 with respect to the plane of movement of the respective flat feed belt; said adjusting means consisting, as shown, of adjusting screws 25 passed through openings in the angularly directed upper portions 26 of the uprights 23 and entering internally threaded chambers 26^a in the carriages 22, or internally threaded openings in cap plates 27 upon said carriage; said adjusting screws 25 being provided with lock nuts 27^a bearing beneath the said upper portions 26 of the uprights 23. The lower end portions of the uprights 23 are angularly bent in directions opposite of that of the upper portions 26 and are bolted, as at 29, to the respective base plate 7, one base plate being provided for each pair of uprights 23; and each base plate 7 is adapted to be disposed between the respective table or support side section 6 and a side rail 31, one of which rails extends at each side of the table or support C, being connected therewith at its ends, as at 32, and spaced therefrom immediately, the base plates overlapping the adjacent table or support section 6, as at 8, as above described. Each of the base plates 7 is chambered at its outer edge portion, as at 34, to receive a curved leaf spring 33 which bears tensionally against the ad-

jacent rail 31, whereby each base plate and the sizing or grading member B organized as described and mounted thereupon may be adjusted longitudinally of the table or support C at one side thereof, and tensionally held in position of adjustment; and the angular end portions 28 of the uprights 23 bearing upon the rail 31 maintain the base plate in its vertical location, in combination with the over-lapping joint at 8.

Suitably socketed and bolted to the lower portion of each upright 23, as at 35, is a guide-arm 36 which projects laterally from the respective base plate 7 toward the next adjacent base plate, from which latter base plate a similar guide-arm 36 projects, both guide arms being joined in overlapping relation, as clearly shown in Fig. 2; and said guide arms slightly overhang the respective flat belt c^1 or c^2 , at the outer edge portions of the same, where said guide-arms overlap, being rounded, as at 37, so as not to impede the motion of the fruit as the same is advanced by the belt. The fruit passes beneath each grading roller 19 and between the inner ends of the guide-arms 36 which are connected with the uprights 23 supporting such grading roller; and similar guide-arms 36 project from the uprights 23 next adjacent to the supply means A and embrace between the same the side walls of a chute 39 embraced within the supply means A, which further comprise an endless belt 40 entering the chute 39 and trained about a pulley 41 journaled beneath the chute 39 and actuated by the operative connections or belt e . The guide arms 36 extend, in the main, parallel with the course of travel of the fruit as moved by the feed means C.

The conveying means E for imperfect fruit comprise a trough or chute 42 mounted upon frame members 9 above and at one side of the feed means C, and an endless belt 43 which in its upper course moves through said trough or chute and in its lower course beneath the same, passing over an idler pulley 44 beneath the trough; said belt being trained about pulleys 45 and 46 journaled beneath the trough, and the latter of which is actuated by the operative connections or belt f .

The bins D at each side of the machine and the feed means C thereof, comprise a continuous outer wall 47, a continuous inner wall 48, and a plurality of laterally adjustable bin walls d as above recited. Each side wall d is cut away, as at 49, to accommodate the adjacent rail 31 and to form a shoulder 50 which is provided with a hanger or sliding bracket 51 having two divergent or spaced arms 52 projecting through an elongated slot 53 in the respective fixed longitudinal wall 48 and engaging with the inner face thereof; each of the arms 52 being provided with a depending finger 54 engaging

the inner face of the wall 48 and a depending finger 55 engaging one side of the wall *d*; and spaced fingers 56 depend from the respective arms 51 so as to embrace the wall *d* at its vertical edge portion, and are secured thereto, as at 57. Each wall *d* may thus be adjusted longitudinally of the continuous longitudinal bin walls 47 and 48, the lower edge of the same resting upon the laterally slanting bin bottom 58, common to the entire bin construction; and the outer vertical edge portion 59 of each bin wall *d* being cut out, as at 60, to accommodate a buffer or padding 61 upon the respective continuous bin wall 47.

The operation, method of use and advantages of the improvements in fruit sizers or graders constituting the invention will be readily understood from the foregoing description, taken in connection with the accompanying drawings and the following statement:—The fruit, such as oranges, is conducted to the machine or apparatus by the supply means A, being led along a chute 39 in a continuous stream to the feed means C, the chute 39 overlying the flat belts *c*¹ and *c*² at the initial end portions of the upper courses thereof. The fruit stream divides into two parts at the respective sides of the drive member *c*³ of the feed means, and the opposite inclinations laterally of the table or support portions 6 and of the belts *c*¹ and *c*² lying thereon causes the fruit to roll toward the guide-arms 36 embraced within the sizing or grading members B. As each fruit unit in its movement upon its flat belt is brought to registration with one of the grading rollers 19 and the space between the same and the respective base plate 7, it passes beneath such roller and over the respective base plate and into one of the bins D, providing its diameter is sufficiently small to permit of its passage beneath the roller, the base plates 7 and the side rails 31 being inclined laterally in common with the table or base portions or sections 6. The carriages 22 and their grading rollers 19 are adjusted to different heights above their base plates 7 by the adjusting means *b* of each, and such adjustment is progressive from the supply means A toward the other end of the machine or apparatus, each grading roller on each side of the machine being adjusted to a slightly greater altitude above its base plate than the next adjacent grading roller in the direction of the supply means; whereby the smallest fruit enters the bins next adjacent to the supply means, and the successive bins along the sides of the base or table G receive successively larger and larger sizes of fruit. The number of sizes of fruit produced in the sizing or grading operation is manifestly equal to the numbers of grading members provided at both sides of the apparatus; and one or

more of such grading members B may be removed from the apparatus or machine or mechanism, the spaces between the same being taken up by the overlapping guide-arms 36 which confine the fruit to the proper 70 courses of travel. Furthermore, each grading member may be set for the selection of the particular size or grade number of fruit, by utilizing the adjusting means *b*, and the size of each bin may be varied by the adjustment of its side bin walls *d* relatively, 75 additional side walls *d* being provided when a large number of small bins are to be utilized in connection with an increased number of grading operations. The fruit as it falls 80 into the bins D rolls or bounds along the bin bottom 58 and strikes against the yielding buffer 61 which prevents injury of the fruit.

The drive member *c*³ of the feed means C positively actuates both flat feed belts *c*¹ 85 and *c*², jointly.

The sizing or grading members B are readily lifted out of their working positions, being sustained in the latter disposition yieldingly by the springs 33; so that each 90 sizing or grading member may be readily removed from working position, and may also be adjusted longitudinally of the table or support G.

The conveying means E is utilized for the 95 purpose of conducting to one end of the mechanism or apparatus such imperfect fruit as may be withdrawn from the apparatus and thrown into the trough 42 and upon the moving belt 43 therein. 100

The apparatus or mechanism operates positively and rapidly and with great precision, the fruit supplied thereto being automatically selected as to size or grade number and segregated from the fruit stream 105 within the bin with which the corresponding sizing or grading member B is associated, all without injury to the fruit.

I do not desire to be understood as limiting myself to the specific provision, construction, formation, association and relative arrangement of parts, members and features shown and described, but reserve the right to vary the same, in adapting the improvements to varying conditions of use, without 115 departing from the spirit of the invention and the terms of the following claims.

Having thus described my invention, I claim and desire to secure by Letters Patent:— 120

1. In a fruit sizer or grader, a plurality of adjustable sizing or grading members, means for feeding fruit successively to the same, and co-acting guide-arms between and connected with the sizing or grading members. 125

2. In a fruit sizer or grader, a plurality of adjustable sizing or grading members, means for feeding fruit successively to the same, and overlapping guide-arms between 130

and connected with the sizing or grading members.

3. In a fruit sizer or grader, means for feeding the fruit in a predetermined course of travel, a plurality of adjustable sizing or grading members arranged at one side of such course of travel, and guide-arms respectively connected with the sizing or grading members and extending between the same in overlapping relation.

4. In a fruit sizer or grader, means for feeding the fruit in a predetermined course of travel, a plurality of detachable adjustable sizing or grading members arranged at one side of such course of travel, and guide-arms respectively connected with the sizing or grading members and extending between the same in overlapping relation and substantially parallel with the course of travel of the fruit as moved by the feed means.

5. In a fruit sizer or grader, a table or support, means for feeding fruit along said table or support, a rail extending at one side of said table or support, a base plate detachably mounted upon said rail and upon said table or support beneath said feed means, means tensionally holding the base plate in position, and a sizing or grading member mounted upon said base plate.

6. In a fruit sizer or grader, a table or support, means for feeding fruit along said

table or support, a rail extending at one side of said table or support, a base plate adjustably detachably mounted upon said rail and upon said table or support beneath said feed means, a sizing or grading member mounted upon said base plate, and tension means yieldingly holding said base plate in position of adjustment.

7. In a fruit sizer or grader, a plurality of relatively adjustable sizing or grading members, means for feeding fruit successively to the same, and a plurality of bins arranged to receive fruit in accordance with the relative adjustment of the sizing or grading members; said sizing or grading members being mounted for adjustment longitudinally of the fruit feeding means.

8. In a fruit sizer or grader, a plurality of sizing or grading members, means for feeding fruit successively to the same, and co-acting guide-arms between the sizing or grading members laterally of the fruit feeding means.

In testimony whereof, I have signed my name to this specification in the presence of two subscribing witnesses.

GEORGE D. PARKER.

Witnesses:

RAYMOND I. BLAKESLEE,
F. A. MANSFIELD.

[Title of Court and Cause.]

Assignments of Error.

Comes now complainant and specifies and assigns the following as the errors upon which he will rely upon his appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree dismissing complainant's bill of complaint, which decree was made and entered on September 30th, 1912:

1. That said United States District Court for the Southern District of California, Southern Division, erred in dismissing said Bill of Complaint.

2. That said United States District Court for the Southern District of California, Southern Division, erred in decreeing that the defendants, or either of them, had not infringed either claim one (1) or claim ten (10) of said reissue letters patent No. 12,297. [818]

3. That said United States District Court for the Southern District of California, Southern Division, erred in not decreeing that each of said defendants had infringed claim one (1) and claim ten (10) of said reissue letters patent 12,297.

4. That said United States District Court erred in not decreeing to complainant the relief prayed in said Bill of Complaint.

In order that the foregoing Assignments of Error may be and appear of record, the complainant presents the same to the Court and prays that such disposition may be made thereof as is in accordance with the laws of the United States.

Wherefore complainant and appellant prays that

the said decree may be reversed and a decree entered in said cause in favor of complainant ordering, adjudging and decreeing that claims one (1) and ten (10) of said reissue letters patent 12,297 are, and each of them is, good and valid, and that the defendants, and each of them, have infringed upon the same, and ordering a perpetual injunction against defendants as prayed in said Bill of Complaint, and ordering an accounting of damages and profits.

FREDERICK S. LYON,

Solicitor for Complainant and Appellant.

(Endorsed.) [819]

* * * * *

At a stated term, to wit, The July Term, A. D. 1912, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom in the City of Los Angeles, on Wednesday, the eighteenth day of December, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable OLIN WELLBORN, District Judge.

[Title of Court and Cause.]

**[Order Directing Transmission of Exhibits to
Circuit Court of Appeals.]**

Good cause appearing therefor, on motion of Frederick S. Lyon, Esq., of counsel for complainant, it is ordered that the following exhibits shall be withdrawn and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, to be used upon the hearing of the appeal in said Court, viz.:

Defendants' Exhibit Photograph Upland Sizer; Defendants' Exhibit Photograph Upland Machine, Knight's Cross-examination; Defendants' Exhibit Model California Sizer; Defendants' Exhibit Photograph of Parker Early Roll Machine; Defendants' Exhibit Photograph of Parker Sizer, installed in packing-house of Riverside Hts. Assn.; Defendants' Exhibit Original Parker Grade Unit; Complainant's Exhibit Second Style Parker Bracket; Complainant's Exhibit Sketch by Edward S. Cobb; Complainant's Exhibit Illustrated Machine; Complainant's Exhibit, Model of Defendants' Machine in [824] Pioneer Fruit Company Case; Complainant's Exhibit Rayburn Overhead System Patent, Letters Patent No. 741,928; Complainant's Exhibit Photo. of Rope Grader; Complainant's Exhibit Photograph Stevenson Machine; Complainant's Exhibit Photo No. 1; Complainant's Exhibit Photo No. 2; Complainant's Exhibit Photo No. 3; Complainant's Exhibit Photo No. 4; Certificate showing public record of Bailey Patent. [825]

[Endorsed]: No. 2232. United States Circuit Court of Appeals for the Ninth Circuit. Fred Stebler, Appellant, vs. Riverside Heights Orange Growers' Association, a Corporation, and George D. Parker, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California.

Filed December 30, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 2232.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Fred Stebler,

Complainant and Appellant,

vs.

Riverside Heights Orange Grow-
ers Association and George D.
Parker,

Defendants and Appellees.

APPELLANT'S OPENING BRIEF.

This is an appeal from a decree of the District Court of the United States for the Southern District of California, Southern Division, dismissing on the ground of non-infringement appellant's bill of complaint.

The bill of complaint is based upon re-issue letters patent number 12,297, granted for the invention of Robert Strain. The invention is a machine for grading or separating fruit according to its sizes.

The District Court decree that appellant was the sole owner of the letters patent in suit and that said letters patent were good and valid in law and that the claims upon which the suit was founded, to-wit: claims one (1) and ten (10) thereof, were both good and valid claims and that Robert Strain was the original, first and true inventor thereof.

The assignments of error, therefore, bring before this court only the question of infringement and the first and last claims of the patent are the only ones involved.

The subject matter of this litigation relates to machines for "*grading*" fruit,—particularly oranges,—and the term "*grading*" as herein used refers to the separation of the oranges in accord with their sizes and has nothing whatever to do with questions of quality.

In order to secure a uniform pack of the oranges in the box it is necessary that all the oranges packed therein should be as near the same size as possible. If there be much difference in size an uneven pack results. Oranges, being customarily sold by the dozen, are packed in boxes containing even dozens, thus the sizes run 96's, 144's, 196's, etc., indicating the number of oranges packed in the box.

From the orchards oranges are taken to the packing house as they are cut from the trees, the various sizes being commingled. Oranges are seldom true spheres and their odd shapes render difficult exact comparisons of their sizes. Before wrapping in paper and packing in boxes it has been found necessary to have the oranges assorted according to sizes and the evenness of the pack being dependent upon the selection of oranges of closely corresponding dimensions rendered it essential that the selection should be closely predetermined. Assortment by hand was too slow and inaccurate.

Prior to Mr. Strain's invention two machines had been utilized for this purpose. These two types of devices were known in the art as the "*rope*" grader, exemplified in patents to Woodward, dated January 12,

1892 [Transcript, page 519], and Cerruti, dated February 26, 1895 [Transcript, page 535], and the "*rope and roller*" grader, also referred to as the "*Ish*" or "*California*" grader, exemplified in the patent to Ish, dated August 25, 1891 [Transcript, page 509]. As we shall see, slight modifications were made in the device of this Ish patent, but its principle of operation remained the same and the objections to it remained until Robert Strain produced the invention here in issue. We shall also see that Robert Strain's invention displaced all the other machines and was immediately recognized as a most important and vital improvement in the art.

THE "ROPE" GRADER.

The principle of this device is best illustrated in the patent to Cerruti, and is most readily comprehended by reference to Fig. 2 of the drawings of that patent [Transcript, page 536]. The oranges in this device were delivered upon two ropes spaced apart, the ropes supporting or holding up the oranges. These ropes travel lengthwise of the machine, being supported at suitable intervals. As the ropes travelled from the end of the machine, where the oranges were delivered onto the ropes, they diverged, thus making the distance between the ropes progressively greater and the opening formed between the ropes was thus continuously growing larger. As the ropes carried the oranges along, the travel of one rope being more rapid than the travel of the other, the oranges were turned over and over on the ropes and whenever the distance between the two ropes was equal to or slightly greater than the size

of the oranges presented between the ropes, the oranges fell through off the ropes. To receive the oranges bins were arranged beneath these traveling ropes. The difficulty with this principle of machine was found in the inability of the operator to place the bins in such relation to the fruit runway formed by the ropes as to secure in a given bin only oranges of approximately the same size. As the ropes were constantly diverging, the size of the opening between the ropes was constantly increasing and it was difficult to predetermine the position of the bins. A good many machines of this type were used prior to Robert Strain's invention, but the machines were only partially satisfactory. They were substantially all displaced by the rope and roller grader type.

THE ROPE AND ROLLER GRADER.

In the patent to Ish, No. 458,422, granted August 25, 1891, this type of machine is illustrated. The patent shows a flat belt arranged at a slight inclination to the horizontal and a stepped or graduated roller arranged opposite this belt. The runway thus formed by this belt and roller presented graduated openings through which the oranges could be delivered. The oranges were delivered to that end of the machine where the roller was of largest diameter and consequently the opening between the belt and roller was the smallest. The belt was moved in a straight line horizontally and longitudinally along parallel with the roller, one side of the oranges resting on the roller, one side of the orange resting on the belt, and the other side of the orange resting on the

roller, the point of contact with the roller depending upon its position with relation to the belt. If the roller projected high above the belt then the point of contact would be below the center of the roller and likewise if the roller were mounted low with respect to the belt the point of contact came high on the roller or above its center. This was simply the preference of the builder or user. The orange being carried along longitudinally of the roller by the belt, and resting on the roller, which did not move longitudinally, caused the orange to be turned, thus presenting between the belt and the roller successive portions of the fruit and eventually the smallest diameter of the orange. When the smallest diameter of the orange was slightly less than the opening between the belt and the roller, the oranges dropped through there between. The form of belt shown in the Ish patent is flat but in the machines placed on the market the longitudinally moving belt was ordinarily a round belt or "rope," as it is generally known, for short. The Ish patent shows the flat belt supported in a groove [see Fig. 4, Transcript, page 511], "to prevent the belt from sagging in order to maintain the graduated opening between the belt and graduated roller uniform" [specification, lines 84-86; Transcript, page 512]. When the "rope" form of belt was used it was likewise supported in a groove for this purpose, the "rope" and "flat" belts being full equivalents for this purpose.

This rope and roller grader had then one side of the gradeway formed of a traveling belt and its co-acting side of a single one-piece roller. The roller was graduated, *i. e.*, viewing the roller from the intake end of the

machine there was a cylindrical portion of a large diameter, then a portion of the roller was turned down to a smaller diameter, and progressively there were as many steps, graduations or reductions in diameter as it was desired to make separations as to size. It is thus apparent that the mere adjustment of this roller toward or from the longitudinally moving belt would simultaneously and correspondingly vary the distance between the belt and each step or graduation of the roller and no means whatever were present or provided by which the operator could control one grade or size independent of the adjacent sizing or separating apertures.

With the machine of this Ish patent the relation of the various sizes to each other was fixed. This relation was predetermined by the builder of the machine and the operator thereof had no control whatever thereover. The operator could vary all the sizes simultaneously but the relation of the sizes to each other remained constant and what is referred to as very "fine" grading could not be accomplished. This fault in the "Ish" machine is the impelling reason for Mr. Strain's invention.

It is of course apparent that it was impractical to make a long grader with a stepped or graduated roller in one piece. In the first "Ish" or "California" graders the roller was about eight feet long and contained eight graduations or steps, thus making the length of each grading surface about a foot long. In order to lengthen out the machine and lengthen the grade surfaces the "Ish" or "California" graders were then made of two or more rollers, each with two to four different and

successively smaller steps or diameters, each successive roller, however, having its largest step or diameter smaller than the smallest diameter or the roller next contiguous thereto. These rollers were so connected together as to rotate as one piece or one roller and in effect comprised a single continuous roller, and the fault still remained embodied in the machine of having the difference in sizes or grades predetermined by the manufacturer and set with respect to each other and not changeable or adjustable one with respect to the other by the user or operator of the machine.

In the packing of oranges for shipment the fruit is necessarily selected by hand as to quality and it must after being separated as to sizes be wrapped in paper wrappers and packed by hand in the shipping boxes. This requires the employment of a large number of packers and consequently room at the side of the bins, into which the fruit is delivered by the grader, for access by the packers to the fruit. As each size of fruit is handled separately it is evident that one problem is to give access to the bins receiving the separated fruit and where the fruit runs comparatively uniform in size, as often happens, to distribute the packers equally to the several sizes and bins results in the loss of time by the packers at some bins and the overcrowding of others and an inability to handle and pack certain sizes of the fruit, with sufficient rapidity to prevent the clogging of the machine.

A second but less vital objection then to this "Ish" or "California" grader was found in actual practice to exist in the fact that it was impossible to vary the point of delivery of a given grade. For example, suppose

the bin to which the second size of oranges delivered from the machine became full and practically none of the oranges were (in the given orchard run) of the third or next succeeding size. The third bin would remain empty. Still it was impossible with such machine to deliver to that bin the second size. The evidence shows that often the oranges from a given orchard run to three or four sizes. Although the old "Ish" or "California" graders were built to separate nine or ten different grades or sizes, the packers at the second bin were unable to handle the second size oranges as fast as they came from the machine while the packers at the third bin were idle, it being of course impossible in a given space to accommodate more than a given number of packers.

There had been many other attempts made from time to time to produce a fruit grader which could be commercially utilized but none of them were found practical. The record shows many of the paper conceptions of inventors to produce a successful device for this purpose. No witness in this case has testified that any of these other paper conceptions could or would prove successful or practical and there is no evidence which even tends to prove a single attempt bordering on a successful use of any of them. The "rope" and the "rope and roller" graders were the only practical machines prior to Robert Strain's invention, and each of these had this inherent objection that the separations as to size were in fixed relation to each other and the operation had no control over each size individually.

With this state of the art before him, Robert Strain conceived the invention in issue. He was the foreman

of the E. K. Benchley packing house at Fullerton, California, and using an "Ish" or "California" grader.

He was the first to recognize the necessity of individual control of each sizing or grading aperture and the first to produce a practical machine which enabled the operator to regulate at will each grade or size and this was the distinguishing characteristic of the machine produced by Mr. Strain and the vital essence of his invention. This feature has been found to be the reason for the Robert Strain invention superceding in use both the "rope" and the "rope and roller" graders.

The distinguishing feature of Mr. Strain's invention was the principle of using to form the grading opening, an independently mounted roller for *each* sizing or discharging opening and mounting *each* roller so as to be independently adjustable to and from the longitudinally moving belt, *thus rendering each of the operative portions of the machine in separating as to size independent of the other and completely within the control of the operator.* By thus enabling the operator to independently control the operative portion of the grader very fine or accurate separation could be accomplished.

No practical form or construction of machine had ever been devised prior to Robert Strain's invention in which each individual grading or sizing opening of the machine had been composed of a belt and an individual and independently adjustable roller, the oranges resting upon both belt and roller and passing along if of greater size than this grade opening and passing through if of the size of the grade opening. One such grade opening does not make a complete grader or sizing machine but it does make up a complete grading

element and it very distinctly illustrates the basic feature of Mr. Strain's invention. The several grade openings need not be absolutely contiguous to secure the novel result secured by Mr. Strain's invention. Each grading member, however, must have its grading opening independently regulable or adjustable and to be a practical machine these grade openings must be arranged end-to-end,—not one above the other or superimposed. It is, however, immaterial whether every portion of the travel of the orange is a grading opening if such grading openings be sequential along the line of travel of the fruit and the fruit be supported at all times during such travel. Thus from the grading opening for the smallest size the remaining oranges may, if desired, be conducted by a belt and co-operating non-grading surface to the point where it is desired to provide the second grading opening for the next larger size of fruit. This intervening space would not alter the principle of action of the Strain invention or machine, nor would it alter the means employed in separating according to sizes nor the interrelation of the parts forming the grading openings.

The "nub" of the Strain invention was the use of a separate and individual roller for each size or grade: the object was to give individual and independent control to the operator of the individual grading opening. In Mr. Strain's machine in which he embodied his invention the belt (either "flat" as Ish first showed and used it, or the round or "rope" form as used in the later "Ish" or "California" graders), formed one side of this individual grading opening and the individual and independently adjustable roller the other side of

this grading opening. This roller was adjustable toward and from the belt to vary the width of this grading opening. This, we repeat, was the real kernel of Mr. Strain's invention and as we shall see this kernel of the invention is appropriated bodily by the defendants and for that reason defendants infringe.

In the machine Mr. Strain adopted the only construction which is practical in a fruit grader: that in which the fruit is supported until it finds its sizing opening and is not subjected to a series of bruising by successive droppings and strikings as proposed in some of the paper forms of the prior art. To be practical the machine must support and carry along the fruit until it is separated according to its size and then discharged with as little chance for bruising as possible.

As is well known, the patent statutes require that the inventor in making application for patent for his invention "shall explain the principle thereof, and the best mode he has contemplated applying that principle." (R. S. U. S., Sec. 4888.)

It was not the intention of this requirement that the inventor be limited to the exact construction described in such application or shown in his drawings thereof but such showing was his preferred construction and in accordance with this statute in his application for letters patent Mr. Strain set forth in his specification and showed in his drawings, a description and illustration of the machine as he preferred to construct it to embody his invention in what he considered the best form thereof.

He showed the usual belt (a "rope" belt being indicated in the drawings), supporting its entire length in

a suitable guiding and supporting groove to prevent the sagging of the belt or its displacement sideways by the weight or travel of the fruit. In his drawings Mr. Strain shows this guiding and supporting groove as of such form to correspond with the shape of the round or "rope" belt shown in his drawings and if he had desired to show a flat belt such as shown in the Ish patent he might have shown the well known groove therefor, such groove being shown in the Ish patent. Mr. Strain showed and described means for causing the belt to travel horizontally the length of the machine, this being the only practical arrangement then or yet known to the fruit grading art. This belt is the carrying means on which the oranges rest and by which they are carried along until they reach the grade opening corresponding to their size. As the object of carrying the fruit along could not be accomplished by the belt alone, without means to hold the oranges thereon, and as it was necessary to turn or rotate or revolve the oranges as they were carried along in order to insure the presentation of the smallest diameters of the respective oranges to grading openings, another surface of some kind opposite the belt was necessary against which the oranges might rest. It is obvious that the grading openings might be arranged one right after the other or might be spaced somewhat apart. As Mr. Strain preferred to make all portions of this co-operating surface opposite the belt adjustable toward and away from the belt and to divide this surface up into small sections each independent of the other, he described in his specification and showed in his drawings a series of rollers, each mounted in its own brackets or

bearings and each independently adjustable with respect to the belt. He describes and shows these individual rollers as arranged in longitudinal extension or end-to-end to correspond with the horizontally moving belt. By thus making all of the surface, co-acting with the belt, adjustable, he secured the maximum control thereof by the operator and if the operator desired to close any portion of this surface close enough to the belt to form idle or non-grading or mere carrying space, he could do so with the same effect as though Mr. Strain had spaced his rollers apart by said means or surfaces arranged in fixed relation to the belt, and when so positioned would perform no function or effect in the machine other than to assist and co-operate with the belt in carrying the fruit to the succeeding grading opening.

In the embodiment of his invention shown in the re-issue patent in suit, Mr. Strain showed and described means for rotating the sizing or grading rollers. This means is the short belts L, and they are so arranged as to rotate or revolve the rollers upwards and against the tendency of gravity to impel the fruit down between the roller and belt. This rotation lifts the fruit and gives the maximum protection against tendency to pinch between roller and belt. It is not essential to positively rotate the rollers by mechanical driving means, although experience has shown it is necessary that one side of the grading opening be in a freely rotating form.

It is not claimed that there was any novelty *per se* in any one of the mechanical devices utilized by Mr. Strain. His invention resided broadly in the use of the

individual rollers, each mounted independently of the other, and each separately and independently adjustable toward and away from the carrier belt. This was the inventive idea conceived and produced by Mr. Strain and he was the first to produce a fruit grader in which the successive grading openings were independently adjustable to give the operator absolute control of the size of each grading opening without effecting the next succeeding or next preceding grade or size.

As the court below found against appellant solely on the ground of non-infringement, appellant will first compare the machines made and used by defendants with the Strain invention.

In defendants' machines the conveying and supporting belt is of the "flat" type. Its function, however, is identically the same as the function of the "rope" belt illustrated in the drawings of the patent in suit, and it performs its function in identically the same manner. In both instances the function of the belt is two-fold,—to support one side of the fruit and to positively carry the fruit along through the machine.

In defendants' machine the functions of the rollers are identical and while the mechanical form of the supporting and adjusting brackets differs in detail, yet the result sought and accomplished is identical and it is performed in identically the same manner. In defendants' machines the oranges rest on the belt, which is inclined slightly toward the rollers, and as the belt moves longitudinally of the machine the oranges are carried along one side resting on the belt and the other contacting with the rollers, if the space between the belt and given rollers is smaller than the diameter of

the orange. The rolling contact of the oranges on the rollers cause the rollers to rotate upward and away from the belt in the same direction and manner as in the machine shown in the patent in suit. The space between the belt and the roller determines the size of orange discharged by or through any given grading or sizing opening formed by such belt and roller. Each roller is individual and it is mounted independently of each of the other rollers and it is adjustable toward and away from the belt without affecting the adjustment of any other roller.

A difference between the machine shown in the drawings of the patent in suit and defendants' machine is the difference in the position of the rollers with respect to the belt, the rollers being positioned higher up with respect to the belt than as shown in the drawings of the patent in suit, but this difference is one which, while it attracts the eye, in substance makes no alteration whatever in the idea or means utilized, or in operation of the machine, or in the co-operation of the belt and rollers, or in the principles of co-operation of the parts. They operate in identically the same way and are the same thing. The fruit rests on belt and roller in both instances in the same manner and for the same purpose and passes between the roller and belt when the opening is of sufficient size to permit such passage. Gravity is the impelling force in each instance to cause the fruit to pass out between the belt and roller. In each machine each grading opening is composed of a belt on one side and a roller or rotating surface on the other and each roller is an individual roller and mounted independently of the other rollers

and adjustable toward and away from the belt to vary at the will of the operating of the grading opening formed thereby without affecting another grading opening.

It is clear that in defendants' machines the same result is sought and accomplished as in the Strain invention and that the idea of means for accomplishing such result has not been changed. The grading openings are formed of the same elements. These elements are the same. And the manner of their co-operation is identical. The roller is an individual roller and it is mounted adjustable toward and away from the belt and such adjustment is not dependent upon any coincident adjustment of any other grading opening or member.

As said by the court in *Moore Carving Machine Co. v. Lucas Machine Company* (200 Fed. 77, 79):

"The patentee's conception was to put the head-piece within the belt, pressing it down upon the belt, to achieve the desired result, and this conception was by him for the first time embodied in a practical machine."

As said by this court in *Norton v. Jensen* (49 Fed. 859, 866):

"It is well settled that a copy of the principle or mode of operation described in the prior patent is an infringement of it. If the patentee's ideas are found in the construction and arrangement of the subsequent device, no matter what may be its form, shape, or appearance, the parties making or using it are deemed appropriators of the patented invention, and are infringers. An infringement takes place whenever a party avails himself of the invention of the patentee without such a variation as constitutes a new discovery."

Judge Nelson in *Blanchard v. Beers* (2 Blatch. 416) said that:

“The sure test, and one the jury should be guided by in all cases of this kind, is whether or not the defendant’s machine, whatever may be its form or mechanical construction, has incorporated within it the principle, or the combination, or the novel ideas which constitute the improvement to be found in the plaintiff’s machine.”

The same learned judge in *Tatham v. Le Roy* (2 Blatchf. 486) said:

“Formal changes are nothing,—mere mechanical changes are nothing; all these may be made outside of the description to be found in the patent, and yet the machine, after it has been thus changed in its construction, is still the machine of the patentee, because it contains his invention, the fruits of his mind, and embodies the discovery which he has brought into existence and put into practical operation.”

The Circuit Court of Appeals for the 7th Circuit, in *Ide v. Trorlicht etc. Co.* (115 Fed. 137), has said:

“Mere changes in the form of a device, or of some of the mechanical elements of a combination, will not avoid infringement, where the principle or mode of operation of the invention is adopted, except in those rare cases in which the form of the improvement, or of the element changed is the distinguishing character of the invention.”

The Circuit Court of Appeals for the 8th Circuit, in *Lourie Implement Co. v. Lenhart* (130 Fed. 122), says:

“One may not escape infringement by adding or subtracting from a patented device, by changing its form, or by making it more or less efficient, while he retains its principle and mode of operation, and attains its result by the use of the same

or equivalent mechanical means. (Walker on Patents, 347, 348; Sewell v. Jones, 91 U. S. 171, 183; Coupe v. Weatherhead, 16 Fed. 673, 675.)”

The fact that it is the policy of the law and the spirit of the courts to construe patents so as to fully cover the real invention produced by an inventor, and to give patent claims such an interpretation as to give the patentee a monopoly over what the inventor has actually produced, is fully and comprehensively set forth in the decisions of the Supreme Court of the United States in *Hobbs v. Beach*, 180 U. S. 383, and *Paper Bag Co. v. Bag Co.*, 210 U. S. 405.

As said in *Eck v. Kutz*, 152 Fed. 758:

“The question is whether *the inventive idea expressed in the patent* has been appropriated; and, if it has, infringement has been made out.

“But with all this the operation is essentially unchanged, not only the whole, but of each part: and this is the significant thing.”

In *Clough v. Gilbert & Barker Manufacturing Co.* (106 U. S. 166), Mr. Justice Blatchford says:

“The combination of the first claim of the Clough patent being new, and, consequently, there never having been any valve arrangement applied to regulate the flow of gas in such a combination, the premises on which the decision of the court below proceeded fail. Clough is entitled to the benefit of the doctrine of equivalents as applied to the combination of the burner, surrounding-tube, and regulating-tube, covered by the second claim of his patent. The regulation in the defendant’s burners was by a tubular valve on the outside of the perforation instead of on the inside, and performing its work by being screwed up or down, as in Clough’s. Although in the Clough structure

the burner and surrounding-tube revolve together in adjusting their position in reference to that of the tubular valve, so as to let in or turn off the supply of gas through the perforations, and although in the Clough structure the flame revolves by the revolution of the burner, and although in the defendant's burners the revolution of the surrounding-tube regulated the supply of gas through such perforation, and neither the burner nor the flame revolved, the defendant's valve arrangement must be held to have been an equivalent for that of Clough to the full extent to which that of Clough goes, involving, perhaps, patentable improvements, but still tributary or subject to the patent of Clough. It is true that that patent describes the tubular valve as being inside of the burner-tube. But Clough was the first person who applied a valve regulation of any kind to the combination to which he applied it, and the first person who made such combination, and he is entitled, under decisions heretofore made by this court, to hold as infringements all valve regulations, applied to such a combination, which perform the same office in substantially the same way as, and were known equivalents for, his form of valve regulation. The record shows that prior to the existence of the appellant's burner it was common in gas burners to check the flow of gas out of the burner by applying an obstruction operated by a screw indifferently outside or inside of the burner. It follows from these considerations, that the defendants infringed the second claim of the Clough patent."

The Court of Appeals for the Eighth Circuit, in *Lewis Blind Switch Co. v. Premium Mfg. Co.* (163 Fed. 950), says:

"A patent for an invention, which is neither primary nor a slight improvement on the prior art, but possesses substantial patentable novelty, covers a reasonable range of equivalents.

"In interpreting the claims of a patent, proper regard should be had to the natural import of the terms in question, the context and the specification.

"The question of infringement turns upon the character of Lewis' invention. We regard it as neither primary nor a slight improvement on the prior art, but as possessing enough of patentable novelty to command a reasonable range of equivalents. The defendants' machine embodies every element or its equivalent, of the claims which we sustain, and accomplishes substantially the same result in substantially the same way."

In *Brown Bag-Filling Mach. Co. v. Drohen* (140 Fed. 97, 100) it is said:

"The Cummings patent in suit, in my opinion, is for a new machine or combination which produces a new and useful result, entitling the patentee to invoke the doctrine of equivalents. The claims secured by the patentee are such that in the determination of the question of infringement by defendant's apparatus the forms and dissimilarities of construction are not controlling. As was stated in *Kinloch Tel. Co. v. Western Electric Co.*, 113 Fed. 652, 5 C. C. A. 362:

"The similarities and differences of machines and combinations are to be determined by the offices or functions which they perform, by the principles on which they are constructed, and by the modes which are used in their operation. A device which is constructed on the same principle, which has the same mode of operation, and which accomplishes the same result as another by the same or by equivalent mechanical means, is the same device, and a claim in a patent of one such device claims and secures the other.' Citing *Machine Co. v. Murphy*, 97 U. S. 120, 125, 24 L. Ed. 935."

The Supreme Court of the United States has repeatedly held that a charge of infringement may be made out though the letter of the claims is avoided.

Machine Co. v. Murphy, 97 U. S. 120;

Ives v. Hamilton, 92 U. S. 426-431;

Morey v. Lockwood, 8 Wall. 230;

Elizabeth v. Pavement Co., 97 U. S. 126-137;

Sessions v. Romadaka, 145 U. S. 29;

Hoyt v. Horne, 145 U. S. 302.

In the specification of the patent in suit [Transcript, page 166, lines 13-16], Mr. Strain says:

“By having short grade-rollers separately adjustable very fine grading may be done and more than one roller may be adjusted to the same grade, if desired.”

This extract is to be read in connection with the whole specification and particularly having in mind Mr. Strain's previous statement [page 165, line 64]:

“Below the grade-rollers are as many bins as there are grade-rollers, which are adapted to hold the fruit which will pass between the grade-roller and the belt.”

These extracts show conclusively that Mr. Strain did not intend to limit himself to one grade-roller for each size of fruit, but may provide a multiplicity of grade-rollers and bins.

In the defendants' machine every alternate roller of Mr. Strain's "short rolls" has been removed and the intervening space filled with a stick or arm along which the fruit travels, being supported and moved along on one side by the belt and supported on the other by this stick or arm. *No grading or sizing of the fruit is accomplished at the points where these sticks or arms are positioned and the result is to lengthen out the*

machine but not to change in any manner the function or mode of operation of the grading openings thus formed by the belt and respective rollers, which still co-operate together and are adjusted in the same manner and for the same purpose as in Mr. Strain's invention.

In defendants' machines these intervening arms have been made telescopic so that each roller may be moved longitudinally of the machine, varying the point at which separation of a given grade or size may be made. This longitudinal movement of the separate rollers is an added feature and forms the subject matter of the Parker patent granted to the defendant George D. Parker long subsequent to Mr. Strain's invention and after Mr. Parker had for years been familiar with the machines in general use involving the Strain invention. The granting of a patent to Mr. Parker upon this longitudinal adjustment of the rollers does not grant to him any right to use the Strain invention without the consent of the owner of the Strain patent. Nor is the grant of this Parker patent any evidence of defendants' machine not infringing the Strain patent. The Parker patent simply secures to Mr. Parker the exclusive right to utilize this longitudinal movement of the rollers to and from given positions and the consequent lengthening out of the machine. This is an added function and improvement and does not change or alter the fact that such a machine embodies in it the inventive idea produced by Mr. Strain and embodied in the patent in suit. The grant of the Parker patent does not show that the Commissioner of Patents has ever considered the question of such infringement.

Where the defendant accomplishes the same function by substantially the same means as the patentee, the fact that such means performs an additional function does not avoid the infringement.

Powell v. Leicester Mills Co., 108 Fed. 386, 47 C. C. A. 416;

Morrison v. Sonn, 111 Fed. 172;

Letson v. Alaska Packers' Ass'n, 130 Fed. 129;

American Can Co. v. Hickmot Co., 142 Fed. 141, 146;

Columbia Wire Co. v. Kokomo Co., 143 Fed. 116;

Comptograph Co. v. Mechanical Acc't Co., 145 Fed. 331, 337;

Corrington v. Westinghouse Co., 173 Fed. 69, 81.

Even though the structure of the defendant contains patentable improvements over the structure of complainant's patent, if the defendant in making those improvements has taken and used *the invention* covered by complainant's patent, he is guilty of infringement.

Weston Elec. Inst. Co. v. Whitney Co., 131 Fed. 280.

The existence of a patent under which an alleged infringer is operating is no protection, if he invades the terms of the one in suit, even though he may improve on it. Mere improvement even to the extent of patentable novelty involving invention does not protect against the charge of infringement.

Diamond Match Co. v. Ruby Match Co., 127 Fed. 341;

Benjamin Elec. Co. v. Dale Co., 158 Fed. 617;

O'Leary v. Utica & Mohawk Co., 139 Fed. 330;
L. J. Muller Co. v. Groeschel, 166 Fed. 917;
Miller v. Walker Pat. Piv. Bin Co., 139 Fed.

134.

The Circuit Court of Appeals for the Sixth Circuit, in *Herman v. Youngstown Car Mfg. Co.*, 191 Fed. 579, considers this question fully, saying:

“Defendant’s device is manufactured under patent No. 765,406, issued July 19th, 1904, to J. H. Wagenhorst, and the court below gave to this fact some force in reaching his conclusion that the device did not infringe. We think that the granting of the later patent and defendant’s conformity thereto are not of importance in this case on the infringement issue. There are expressions in some of the reported cases implying that by later patents the government has granted a right to make and use the article so patented, and that such grant is inconsistent with any construction of the earlier patent which would forbid the manufacture of the later structure. Such implication rests on a fundamental error. A patent is not the grant of a right to make or use or sell. It does not, directly or indirectly, imply any such right. It grants only the right to exclude others. The supposition that a right to make is created by the patent grant is obviously inconsistent with the established distinctions between generic and specific patents, and with the well-known fact that a very considerable portion of the patents granted are in a field covered by a former relatively generic or basic patent, are tributary to such earlier patent, and cannot be practiced unless by license thereunder.

“Another reason sometimes advanced for supposing that the structure of the second does not infringe the claim of the first patent is that the Patent Office has declared that a patentable difference exists. The premise is sound, but not the

conclusion. *In examining the second application, the Patent Office has no concern with the scope of the claim of the first, and does not and must not pay any attention thereto. It is concerned only with the early disclose by the specification and drawings. Patentable difference does not of itself tend to negative infringement. It may be as well based upon infringement, plus improvement; and improvement may lie in addition, simplification, or variance."*

As said by the Circuit Court of Appeals for the Second Circuit, in *Cimiotti Unhairing Co. v. American Co.*, 115 Fed. 504:

"The mere fact that there is an addition, or the mere fact that there is an omission, does not enable you to take the substance of the plaintiff's patent. The question is not whether the addition is material, or whether the omission is material, but whether what has been taken is the substance of the invention."

See also:

Long v. Noye Mfg. Co., 192 Fed. 570.

The substance of the Strain invention, as we have heretofore pointed out, was the formation of the grading openings of a co-operating longitudinally moving carrying belt and an individual roller mounted independent of the other rollers and separately and independently adjustable toward and from the belt to regulate the size of the grading opening, thus giving the operator individual or independent control of each grading opening. This was the novelty of the Strain invention and this has been appropriated bodily in the defendants' machines.

The interposition between respective grading open-

ings of a non-grading space formed by fixed means, such as telescopic arms, has served to lengthen out the machine and permit an added adjustment to the grading openings, *i. e.*, the point of delivery may be adjusted with respect to the longitudinal extension of the belt, *but the principle of the individual rollers independently mounted and independently adjustable with respect to the belt and for the same purpose as in the Strain invention remains identical.* It is definitely ascertained, therefore, that the defendants' machine have not altered the function of the individual rollers, their independent mounting or their independent adjustment, or their relation to the belt in forming the grading opening or in separating the fruit as to sizes. It is immaterial then whether the added longitudinal adjustment of the rollers in their supporting brackets is an improvement or a mere colorable variance of the means for accomplishing another purpose.

A slight variation existing between the defendants' machines and the machine shown and described in the patent in suit resides in the omission of positive driving means for rotating the individual rollers. Mr. Strain has shown his rollers positively driven by belts and such positively driving the rolls has been made an element of all the claims of the re-issue patent except claims one (1) and ten (10), the only ones in controversy in this litigation.

To limit either claim 1 or claim 10 to the means for positively rotating the rollers is to make such claims practically identical and of the same force, effect and scope as other claims in the re-issue patent and the fact that no mention is made in either of these claims

shows the intention not to limit them to such driving or rotating means. This is particularly emphasized by the inclusion of such means in the other claims wherein they are definitely called for by the term "means to revolve each of said rollers, etc." in claim 3, and "means for driving the rolls," claims 4, 5, 6, 7, 8 and 9. In fact the reason for not including others of the claims as infringed by defendants' machines is solely because of the limitation thereof to such "means for driving the rolls."

The defendants' machines embody and utilize *rotating* rollers to form the grading openings. Rotation of these rollers is caused by the oranges being propelled along by the belt, the position of the belt being slight under the horizontal axis of the roller the fruit is carried along by the belt as an upward movement against the surface of the roller causing it to revolve.

Removal of the driving belts of the Strain machine demonstrates that the action is the same, the rollers rotating under the advancing action of the fruit in the same manner and direction as where the driving belts are used, the difference being merely one of degree. The testimony of the witnesses on this point is definite and certain.

Mr. Stebler, the complainant and appellant, testifies in this regard:

"I have visited quite a number of packing houses using my independent roller sizers and endeavored to demonstrate by actual experiment to my own satisfaction whether or not it is a fact that the positive driving of these rollers was necessary in order for the machine to perform its function and in no case have

I been able to find where the discarding of the belt from any one of these rollers seemed to make any material difference in the operation of grading fruit on this machine, either as to the sizing of fruit or the general operation of the machine. In no case have I been able to find where the machine would choke up from the non-driving of these rollers, but on the other hand I did find that on the removal of the belt from any one of these rollers, the roller would continue to rotate when the fruit was run over it through the action of the fruit itself and thus enable the machine to perform its function which it is intended to perform in grading fruit.

Q. 6. You have used in your last answer the term 'choke up.' What do you mean by that term?

A. By this I mean, as I suppose Mr. Parker meant, that there was no choking or crowding on the grade-way and that the fruit would carry on by this non-driven roller through the action of the solid belt or rope.

Q. 7. Machines in what packing houses did you examine?

A. I examined machines in the packing house of the Mountain View Orange and Lemon Growers' Association, at Upland, and the Stewart Citrus Association at Upland, and the packing house of the Upland Citrus Association, where I believe Mr. Parker testified he got negative results, and the packing house of the Arlington Heights Fruit Company at Prenda.

Q. 8. Where is Prenda?

A. It is about three miles from the city of Riverside in Riverside county.

Q. 9. In this last packing house, were they engaged in commercially packing oranges at the time?

A. Yes, sir.

Q. 10. What did you do in order to demonstrate the commercial practicability of the individual adjustable independent roller grader of the patent in suit without the use of means for mechanically turning or rotating the rollers, in this last packing house?

A. I simply removed the small driving belt from the pulley on the driving shaft and also removed from this belt the automatic weight tightener so that while

the belt itself was in contact with the roller, it was slack and free from the driving shaft, thus permitting the roller to freely rotate from the slight action of the fruit against it as it passed over the grade-way.

Q. 11. In this particular packing house what rollers in position along the grade-way did you so try in the commercial grading of oranges?

A. It was about the second or third roller from the free end, that is the end from which the fruit is fed into the machine.

Q. 12. Who was present during such trial?

A. Yourself, Mr. Arthur P. Knight, who has previously testified in this case, also a Mr. Whiffin, the packing house manager.

Q. 13. To what extent did such roller with the belt removed rotate during the commercial use of such machine?

A. Why it rotated continuously when the fruit was in contact with it. It would only stop when the fruit was not in contact with it.

Q. 14. Did you see any difference in the rate of rotation with or without the belt?

A. Almost the same as when it was positively driven.

Q. 15. And at Uplands, what roller in the length of the run-way did you try without the belt thereon?

A. Well, at the Mountain View house I think it was the second or third roller from the feed end of the grade-way and at the Upland Citrus Association it was about the third or fourth roller from the entrance to the grade-way and at the Stewart house we tried rollers at both ends of the machine.

Q. 16. What was the object of trying different rollers on these different machines?

A. Merely to determine the proportionate rate of rotation.

Q. 17. Did it make any difference in the various operations of the machine which ones of the rollers were mechanically driven?

A. We could not see that it did.

Q. 18. If I understand the operation of a fruit grader, Mr. Stebler, the larger amount of fruit passes

over the rollers at the feed or intake end, is that correct?

A. That is correct.

Q. 19. And if there were to be any crowding of the fruit it would be more apt to appear at that end?

A. It certainly would.

Q. 20. Have you seen any of the defendant's machines in operation?

A. Yes, sir.

Q. 21. Have you seen any of them in operation at the Riverside Heights Orange Growers' Association's packing house at Riverside, California?

A. Yes, sir.

Q. 22. When did you last see them in operation?

A. A week ago today I believe it was, which would be the twelfth.

Q. 23. In the presence of whom?

A. In the presence of yourself and Mr. Knight.

Q. 24. What was the object of such inspection?

A. Well, this inspection was made with the idea of verifying to our own satisfaction the comparison between defendant's machine and my own.

Q. 25. Were they commercially packing oranges at that time?

A. Yes, sir.

Q. 27. At the Riverside Heights Orange Growers' Association's packing house at Riverside, to which you last referred, at one end of the packing house they also have one of your graders built under the patent here in suit, have they not?

A. Yes, sir.

Q. 28. Did you observe the operation or rate of rotation of the rollers in your machine with that in the Parker or defendant's device at that time?

A. Yes, to this extent that taking my machine with the belt off the roller, that is with the roller non-positively driven, the rotation of the roller in my machine and the rotation of the roller in Parker's machine at approximately the same given point, or near the intake end, the rate of rotation was approximately the same.

Q. 29. Referring now to the Parker machine which you say you saw in operation on Wednesday, June

12th, at the Riverside Heights Orange Growers' Association's packing house at Riverside, California, did you notice particularly the action of the individual independent adjustable rollers in that device?

A. Yes, sir.

Q. 30. Were these rollers stationary or in motion?

A. They were only stationary when there was no fruit running against them.

Q. 31. And what did you observe in regard to the first two or three rollers toward the intake end?

A. They were in continuous rotation as long as there was any fruit running over them.

Q. 32. In what direction was this rotation with reference to the axis of the rollers and with respect to the longitudinally traveling belt?

A. The top of the roller turned outward or away from the traveling belt, the same as in my machine.

Q. 33. You say, 'the same as in my machine.' Do you mean the machine of the patent in suit?

A. Yes, sir.

Q. 34. And the same as the rollers are driven in such machine when the little cross belts are used?

A. Exactly. [Transcript, pages 597-602.]

Q. 61. Why, then, if the tendency is to force the orange down, why does not the roller tend to rotate downward when it has no belt on it?

A. Because the pressure of the orange is above the axis of the center of the roller.

Q. 62. And in practical operation, according to your observation, this tendency results in the rotation of the rollers, where no belt is used?

A. Yes, sir.

Q. 63. And that rotation was upward and away from the belt?

A. Yes, sir.

Q. 64. Is that also true of the defendant's grader?

A. Yes, sir.

Q. 65. Did you observe in the (*defendant's machines*) Riverside Heights Orange Growers' Association's packing house, at Riverside, on June 12th, 1912,

any tendency of the oranges to pinch between the belt and the rollers?

A. Yes, sir.

Q. 66. To what extent?

A. To the extent that it rotated the rollers. [Transcript, page 608.]

Q. 67. What reason have you for continuing to provide the rollers of the patent in suit with the belt means for positively rotating the rollers?

Mr. Acker: By the use of the word 'continuing,' Mr. Lyon, in your last answer, do you mean to imply that the complainant, at any time, ceased to supply the machines with the drive means referred to?

A. We have always built them with the power driven rollers.

Q. 68. Now answer my question with regard to the reason for so doing.

A. We prefer to employ this means for the reason, if for no other reason, that it takes away the excessive friction or pressure on the oranges necessary to turn the rollers. As a whole we are positive that the power or positive driving of these rollers reduces to the minimum all tendency to pinch the fruit.

Q. 69. Then, if I understand your answer correctly, based upon your experience, the positively driven roller is superior in its action?

A. Yes, sir, I so testified.

Q. 70. But that it is not a necessity in either the commercial or mechanical operation of the machine?

A. No, not necessary.

Q. 53. What, Mr. Stebler, is the reason for using a moving or rotating member as one side of the fruit run-way in an orange grader?

A. To prevent pinching the fruit.

Q. 54. Will you explain a little more what you mean by preventing pinching the fruit?

A. Well, in all fruit graders of this type, having a traveling longitudinal conveyer, the object of which is to carry the fruit longitudinally along the machine, the

action of this conveyer, or rather the action of the fruit on the conveyer is through the mere force of gravity itself to wedge under or between this traveling conveyer and the opposing member. I suppose the correct way to state it would be this: The conveyer being in contact with only one side of the oranges, tends to roll them lengthwise of the machine and naturally this rolling motion if carried far enough must either crush the fruit in its attempt to work down and under or between the grading members or something else has to give way, but the rotative motion imparted to it by a rotating member in opposition to the traveling conveyer tends to prevent this crowding or pinching, hence, *either a positively driven rotative member or a member free to rotate through this squeezing action itself is necessary.*"

This testimony is fully corroborated by appellant's expert, Arthur P. Knight, who testifies:

"Since giving your former testimony have you had occasion to make any further investigation of the fruit graders in actual operation?

A. Since that time I have seen the Parker grader as well as the Stebler grader in actual operation.

Q. 4. When you refer to the Stebler grader, in your last answer do you mean the machine embodying the construction and interrelation of parts illustrated by the patent in suit?

A. Yes, sir.

Q. 5. Where did you see each of these kinds of graders and when?

A. On Wednesday, June 12th, 1912, I saw both of these graders at Uplands and at Riverside, California.

Q. 6. Did you not also see the Parker grader in operation at Pomona on that date?

A. Yes, sir.

Q. 7. The Parker graders that you saw at Riverside were in the packing house of the Riverside Heights Orange Growers' Association at Riverside?

A. Yes, and at another place in the southern part

of the city. I do not recall the names of the packing house.

Q. 8. At the Riverside Heights Orange Growers' Association you also saw one of the devices of the patent in suit in operation?

A. Yes, sir.

Q. 9. And at the Arlington Heights Fruit Company at Arlington Heights, a few miles out of Riverside, on June 12th, 1912, you also saw the device of the patent in suit in actual commercial operation, did you not?

A. That is the building with which Mr. Whiffen is connected?

Q. 10. Yes.

A. Yes.

Q. 11. Mr. Knight, who was present at Pomona with you?

A. Yourself.

Q. 12. And at Uplands and Riverside and Arlington Heights who was present with you?

A. Yourself was present at each of these places and as I remember it Mr. Tucker was also present at Uplands and Mr. Stebler was present at each of these places.

Q. 13. Except Pomona, you mean?

A. Well, the last three.

Q. 14. Did you observe the manner of operation of the defendant's or Parker machine particularly at the places named by you?

A. I did.

Q. 15. With respect to the functions performed by the rollers of the defendant's or Parker machine, can you state their manner of operation or how they operated?

A. They operated, of course, as the sizing member or limiting member at one side of the grade-way. Further than that, operating as rollers, they turned more or less under the action of the fruit as it passed along in the case of the Parker machine and also in the case of the Strain or Stebler machine whenever the belt was removed.

Q. 16. At what end of a fruit grader is the fruit the heaviest?

A. You mean—

Q. 17. I mean by 'heaviest' in this question as to the quantity and amount of work to be done by the machine.

A. There is more fruit passing necessarily at the initial end of the machine since some of the fruit passes off from time to time as it passes along the grade-way.

Q. 18. Did you particularly observe the action of the rollers in the defendant's or Parker machine at the initial or intake end of the machine?

A. Yes, sir, at that end I noticed on several occasions where the fruit was coming along close together there would be a large number of oranges in contact with a single roller, and under this condition, the roller would turn substantially continuously in a direction upwardly on the side toward the rope or belt.

Q. 19. Did you notice particularly the operation of the Stebler or Strain sizer at the Riverside Heights Orange Growers' Association in this regard, with the belts on?

A. Yes, sir, both with the belts on and with the belts off.

Q. 20. And did you compare the rate of rotation of the rollers with the belts off on such Strain sizer with the initial two or three rollers of the Parker machines as they were in commercial operation in the Riverside Heights Orange Growers' Association's packing house at Riverside, California, on that day?

A. I compared them in a way as far as my memory would serve me to compare them, not by actual measurement, but by judgment.

Q. 21. And what was that comparison, so far as it was capable of being determined by observation?

A. That they revolved substantially at the same speed in these first few rollers as if they were driven by belts under the same conditions in the Strain machine.

Q. 22. You say that you saw the Strain or sizer of the patent in suit operated without the belts. Please

explain how that was done, where and what were the results?

A. At Arlington Heights we threw off the belt from the first section of roller and supplied fruit liberally to the machine and also sparsely and in such case when there was any fruit passing over the roller it would rotate and the amount of rotation was increased as the amount of fruit delivered to the roller was increased.

Q. 23. What was the direction of the rotation of the roller?

A. Outwardly toward the other side of the grade way.

Q. 24. Compared with the direction of the rotation when the belt was on, what was the direction of the rotation with the belt off?

A. It was the same.

Q. 25. And at the Uplands houses did you make any demonstration of the Strain or the graders of the patent in suit by removing any of the belts?

A. Yes.

Q. 26. And what were the results of such demonstrations?

A. The same as at Arlington Heights.

Q. 27. To what extent were these demonstrations carried on as to enabling you to testify from actual experience in the grading of oranges and as to the operation of the Strain device without the use of the belts or other means for mechanically rotating the rollers?

A. To a sufficient extent to satisfy myself that it could be so operated.

Q. 28. If I understand you correctly, this visit was made in view of your previous testimony in this case and the somewhat contradictory character of the evidence of some of the defendants' witnesses in regard to this fact, is that correct?

A. Yes, sir.

Q. 29. Can you give us the mechanical reason why both the rollers of the Parker or defendant's sizer and the rollers of the grader of the patent in suit rotate in the manner described by you without mechanical means for mechanically driving the rollers?

A. It is very evident from the fact that they do rotate that there must be a component of rotary motion at right angles, I should say, transverse to the longitudinal movement of the belt or rope. While I have never investigated the thing mathematically, I should judge that this is due to the oblique rotation of the oranges with reference to the longitudinally moving member, due to the tangential impulse imparted to the orange in longitudinal direction, results in rotation around an oblique axis and this in turn has a component in the transverse plane, tending to turn the orange in such a manner as to raise the adjacent side of the roller. The whole thing could be worked out by graphic analysis if a person cared to do it, but the operation speaks for itself." [Transcript, pages 671-681.]

This is also fully corroborated by the testimony of M. R. Whiffin, the superintendent of several packing houses at Riverside county, Cal. [Transcript, pages 728-738.]

The use of the individual and independently mounted and independently adjustable rollers in defendants' machines is explained in the history of the development of the infringing machines. Another infringement was attempted by Mr. J. W. Stevenson, after a failure with a machine which would not have infringed. Mr. Stevenson attempted to do away with a rotating roller as part of the grading opening. Without such a rotating surface forming one side of the grading opening the machine was found impractical. George D. Parker, one of the defendants, and the manufacturer of the infringing machines made by defendants, had full knowledge of this failure and adopted the rotating rollers of the Strain invention to avoid this difficulty shown up by Mr. Stevenson's failure. Mr. Stevenson's

testimony in regard to these facts is found on pages 739-779 of the transcript. Appellant has introduced in evidence a photograph of this impractical Stevenson machine. It is known as "Complainant's Exhibit Stevenson machine." It forms a very interesting link between success and failure and between the use of the Strain invention and the avoidance of the use thereof.

This Stevenson machine employs the same flat belt construction that is employed in the defendants' machines, and the belt is mounted and driven in almost identically the same manner. In fact, except as to the individual rollers and the telescopic arms between the rollers the Stevenson machine and the Parker or defendant's machines, the two are identical. Mr. Stevenson says he attempted to avoid infringement of the patent in suit by the use of non-rotating rods, but that this caused such a pinching of the oranges as to so severely injure the fruit as to render the machine impractical. Another fault was that "when the fruit would roll against that stationary rod it would try to go under before it came to a place where there was quite room enough, and the consequence was that it would push the belt into the center and sometimes force the belt high up in the center until the fruit would get off the runway." [Transcript, page 745, answer to Q. 48.] It is thus apparent that the use of rotating rollers as one side of the grading opening is the *sine qua non* of success.

This testimony also emphasizes the substance of the Strain invention, as we have heretofore determined it. Mr. Stevenson tried individual and independently ad-

justable rods to form the grading openings, but the result was failure. This testimony also emphasizes the fact that the Strain invention was not necessarily a continuous roller surface the length of the machine, but that the necessity for a roller surface existed at the grading openings through which the fruit was to pass. But this attempted use by Mr. Stevenson of the rigid stationary non-rotating rods proved the necessity of a rotating surface at the grading opening only. It clearly shows that, when considered as to whether it involves the Strain invention, whether with or without an improvement, defendants have adopted and used the vital essence of Mr. Strain's invention, and so far as Mr. Strain's invention is concerned the use of the telescopic arms and the longitudinal movement of the rollers and their brackets is a mere subterfuge and evasion, not changing in any manner the real interrelation of the parts or their mode or principle of co-action and co-operation.

THE CLAIMS IN SUIT.

Infringement is claimed of claims 1 and 10, the other claims of the patent being limited, as heretofore pointed out, to a fruit-grading machine in which the sizing or separating rollers are mechanically rotated or driven.

Claim 1 is as follows:

"In a fruit-grader, in combination a plurality of independent transversely-adjustable rotating rollers; a non-movable grooved guide lying parallel with the plane which passes vertically and longitudinally through the center of said rollers; said rollers and guide forming a fruit-runway; a rope in the groove in said guide and means to move said rope."

In the drawings of the Strain re-issue patent these elements may be pointed out as follows: the plurality of independent transversely-adjustable rotating rollers, represented at M; the non-movable grooved guide lying parallel with the plane which passes vertically and longitudinally through the center of said rollers, represented at I, the groove being the groove in which the rope belt H is mounted and the means for moving the rope consisting of the driven pulleys G and J over which the rope belt travels. The rollers are transversely-adjustable, *i. e.*, cross-wise of the belt. The grooved-guide lies in an extended horizontal plane, which plane cuts the rollers vertically and longitudinally substantially at the centers of the rollers.

In the defendant's machine the belt is mounted in a grooved guide, referred to as a "table or support G" in "Complainant's Exhibit Parker Patent" [Transcript, page 787, lines 75-85], the groove anchoring the belt in place being at the apex, and the two parts of the flat belt being mechanically connected to the small belt or chain, termed a "drive member c3" in the Parker patent. The relative arrangement of this grooved guide or "table or support" is the same, with respect to the individual and independently adjustable rollers, as shown in the Strain patent, lying parallel with the plane which passes vertically and longitudinally through the center of said rollers. The belt is driven by passing over pulleys at each end of the machine. It is thus seen that the defendants' machine corresponds absolutely with the terms of this claim. The only distinction that can be made is the separation of the several grade-openings and the non-grading space between

such grade-openings. This, however, has not changed the principle of the machine in separating fruit according to its size nor has it omitted the use of individual rollers, nor the use of rollers forming with the belt the grade-openings, nor the provision of independent adjustment of the width of such grade-openings by transverse adjustment of the individual or independent grade rollers.

It is of course to be noted that this claim 1 describes a machine in which the several grade-openings are in longitudinal extension in a horizontal plane and not superposed. This alone was not a novelty of the Strain invention, but it is one of the features, also present in the defendants' machines, which have permitted the construction of a practical machine in place of such an impractical form and mode of operation as that disclosed for example in the Hutchins patents, in which each grade-opening is arranged one above the other and the fruit is caused to drop through the successive steps until it finds its proper size, causing such a bruising of the fruit as to be impractical.

Claim 10 differs from claim 1 in its reference to the means for supporting the rolls, and in some respects is more in detail. It is:

"In a fruit-grading machine, a runway formed of two parallel members, one of said members consisting of a series of end-to-end rolls, brackets carrying the rolls, guides for the brackets, and means for adjusting the brackets upon the guides, substantially as set forth."

In the Strain machine one of the parallel members is the belt and the other the series of individual rolls;

in the defendants' machines there are also present the belt forming one member and the individual rolls forming the other grading members. The only distinction so far as this claim is concerned is the separation of the rolls and the telescopic arms between the rolls, thus not utilizing any portion of the separation of the rolls apart for the purpose of grading, but simply carrying the orange by that much space, thus lengthening out the machine for the added purpose of the Parker invention, without changing the spirit of the machine in separating the fruit as to sizes or the idea of means employed for securing the grading-openings or the manner of securing the independent adjustment of each grading opening without affecting the other grading openings, utilizing the substance of the Strain invention without in reality changing the mechanical form of the grading members or the interrelation of the parts forming such independently adjustable grading openings, thus as we claim coming directly within the line of decisions hereinbefore referred to and which may be summed up in the words of the Circuit Court of Appeals for the Second Circuit (*Cimiotti Co. v. America Co., supra*):

“The mere fact that there is an addition, or the mere fact that there is an omission, does not enable you to take the substance of the plaintiff's patent. The question is not whether the addition is material, or whether the omission is material, but whether what has been taken is the substance of the invention.”

The testimony of Mr. Knight, appellant's expert, in comparison of the Strain invention and defendants' machines, shows conclusively that every element of

claims 1 and 10 are present in the defendants' machines and that the latter have not varied whatever the mode of operation or principle of the Strain invention but have adopted and used it bodily. Mr. Knight testifies:

"Q. 12. Have you examined and are you familiar with the construction and mode of operation of the device of Complainant's Exhibit Parker Patent Number 997468?

A. Yes sir.

Q. 13. Will you please take the Complainant's Exhibit Patent in Suit and explain the mode of operation of the device of that patent, so far as the grading is concerned, and by that I mean eliminating from consideration the matter of the adjustable bottoms for the bins, and then compare the construction, elements and mode of operation of the device of this patent with the same in the Complainant's Exhibit Parker Patent, and in making this comparison you may make such reference as you desire to Complainant's Exhibits Photos 1, 2, 3 and 4.

A. In the grader shown in the Strain patent in suit, the fruit is supplied upon one end of the runway, one side of which is formed by the traveling rope or round belt and the other side of which is formed by the grading rolls so that by the motion of the rope or traveling belt the fruit is successively brought in contact with the successive rollers. These rollers are spaced in relation to the traveling belt so as to present an aperture between each roller and the belt, the width of these apertures increasing in the case of the successive rollers so as to increase sequentially from the beginning to the end of the series of rollers. When the fruit reaches an aperture which is sufficiently large it will pass through this aperture, and in this respect the operation is that of any successful grader, but the distinguishing characteristic in the operation of the Strain machine as shown in this patent is that the width of these apertures may be adjusted individually and independently for the different rollers so that any

desired variation along the length of the series may be obtained. Thus, in case an even grading of the fruit is desired, the rolls may be set so that each roller is spaced a definite distance further from the rope than the preceding roller, and if any variation is desired, these rollers may be set so that the excess of difference from the rope is less in some cases than in others, and in fact, as pointed out in the patent, page 2, lines 13 to 21, the rollers may be adjusted so that more than one of said rollers is adjusted to the same grade. While the operation of this machine, in a broad sense, is similar to any grader in which the fruit is presented successively to apertures of increasing width between the longitudinally movable member and the transversely movable member, it carries out this operation in a peculiar manner, in that it enables the width of the apertures to be adjusted independently of one another throughout the length of the series of rollers, so as to provide for any desired distribution of the grading by the rollers.

In the Complainant's Exhibit Parker Patent, and the Photos one to four, Complainant's Exhibits, the operation of the machine is as follows: The fruit is fed by a suitable supply means into the runway, one member of which consists of a longitudinally traveling belt and the other member of which comprises a series of rotatable rolls. These rollers are mounted adjustably, so that the distance between each roller and the other member of the runway, viz.: the traveling belt, can be adjusted independently and individually with the different rollers. As the fruit is carried along in the runway by the traveling belt, it is presented successively to contact with the successive rollers and passes through the aperture between the roller and the belt when an aperture is presented of sufficient width to permit of such passage. The adjustable mounting of the several rollers is such that the width of this aperture may be adjusted independently and individually for the several rollers so that any desired distribution of the grading may be provided for along the length of the grader. *In respect, therefore, to the characteristic feature of the Strain Patent, which I*

have above referred to, the manner of operation of the Parker machine is the same as that of the Strain machine. The Parker machine, however, includes an additional feature, viz.: the provision of what are called "guide arms," shown in the drawing by the numeral 36, which are affixed to the supports for the several rollers and overlap one another so as to form fixed walls between successive rollers. By means of these guide arms the adjustable rollers may be spaced farther apart or nearer together and may be shifted longitudinally of the machine, thereby providing for certain alleged advantageous results in distribution. These guide arms, however, do not affect the operation of the rotating or rotatable rollers per se, the operation of said rollers in connection with the traveling belt coming into play only when the fruit is in contact with the rollers and the fruit at that time being out of contact with these guide arms, so that the two operations are non-current and independent.

In other words, the guide arms serve the purpose of conducting the fruit from each roller to the next roller and are therefore idle as far as the grading operation is concerned; their function in connection with the longitudinally adjustability of the rollers along the runway is to provide for the determination of the several locations at which the fruit shall pass from the runway, thus the adjustment of the rollers is entirely by these guide arms, and the longitudinally adjustability of the rollers is therefore a question of location of discharge, in other words, distribution and not of size or determination of the grade or the several grades."
[Transcript, pages 117-122.]

In this connection we call attention to the testimony of M. R. Whiffin, who is superintendent of a number of orange packing houses and familiar with both the defendants' machines and the machine of the Strain patent. He summarizes his testimony in regard to the similarities of the two machines when the Strain machine does not have its independently-adjustable grad-

ing rollers power driven, as follows: "They are practically the same thing, one is horizontal, the other perpendicular." [Transcript, page 737.]

In the District Court the defendants contended that claim 1 had been limited in the prosecution of Mr. Strain's application for his original patent in response to the demand of the Patent Office. On pages 175-176 of the transcript the original six claims presented on behalf of Mr. Strain are set forth. Original claim 1 calls for a single roller. This was the construction shown in the "Ish" patent and used in the "Ish" or "California" machines, and as seen on page 178 of the transcript this original claim 1 was properly rejected and withdrawn in view of the "Ish" patent. Its cancellation has no bearing upon claim 1 of the re-issue patent in suit, as the substance of Mr. Strain's invention, as we have heretofore pointed it out, is not defined in this original claim 1, which do not call for a plurality of independent transversely-adjustable rollers such as shown by Mr. Strain and used by defendants. This original claim 1 does not call for such elements as embody Mr. Strain's real invention. Original claim 2 included "*a fruit-retaining bin below each roller, having an apron therein to break the fall of the fruit.*" This element is totally lacking in claim 1 of the re-issue and this omission shows that claim 1 of the re-issue and original claim 2 are for totally *different combinations*. Clearly present claim 1 of the re-issue is broader in terms than original claim 2, and the cancellation of said claim 2 did not amount to an abandonment of the combination thus expressly claimed in broad language in the substituted claim 1 of the re-issue. The com-

binations are different,—they are distinct entities in Patent Law. Original claim 3 called simply for making a roller transversely and independently adjustable regardless of all other elements utilized to make up a machine. Such a claim would cover the “Ish” or “California” machine, in which both ends of the stepped roller were mounted in adjustable bearings. Thus we again see that what we have heretofore found to be the substance of the Strain invention is not expressed in this claim, as the novel result sought and attained by Mr. Strain is not present in a machine in which one roller is adjustable.

Original claim 4 also calls for “a fruit-retaining bin below each roller.” In substituting claims for these original six claims Mr. Strain did not limit present claim 1 of the re-issue to “a fruit-retaining bin below each roller” or to any fruit bin or bins, and therefore a claim which calls for such bin beneath such roller has no bearing upon the scope of a claim for a different combination, expressed in a substitute claim, of which such bin construction forms no part or element and which is not limited by its terms to such a bin element. This original claim 4, like original claim 2, has no bearing whatever on the present claim 1 of the re-issue patent in suit.

Original claim 5 was drawn to embrace the bin construction *per se*, and has no bearing whatever on either claim 1 or 10 of the re-issue. Original claim 5 was not drawn to even the same general subject matter.

Original claim 6 is claim 3 of the re-issue patent and was allowed by the Patent Office on its first action or inspection of the original Strain application.

In substitution for these original claims 1-5, Mr. Strain, by his first amendment [Transcript, pages 180-181], redrafted three new claims. The first of these was claim 1, now under consideration as claim 1 of the patent in suit.

Is it not as fair to say that Mr. Strain submitted present claim 1 in substitution for his original claim 1 as that it was in substitution for any other of such claims? The essential difference between the original claim 1 and the claim 1 of the re-issue patent in suit is the limitation of the latter to a machine using a plurality of grading openings each having its individual and separately adjustable roller, thus setting forth in such substitute claim the substance of the Strain invention. Such substance was found to be patentably novel by the Patent Office.

That the foregoing construction of the action of the Patent Office in rejecting said original claims and of Mr. Strain in making the substitution of the new claims, including present claim 1, is correct, is definitely proven by reference to the "Remarks" of Mr. Strain's attorneys in submitting the substitute claims. They say: "Examiner cites Ish to show *a* stepped roller and Hutchins of 1891 to show an adjustment of *a* roller and Ellithorpe to show *a* soft bottom for a fruit bin. We desire to call Examiner's attention to the following points of difference between applicant's device and the references. If you apply Hutchins' adjustment to Ish's roller *you do not produce the same effect as can be produced with applicant's independently adjustable rollers.*" This is a recognition and affirmation of the very distinction which we have heretofore

brought out and an assertion that the substance of Mr. Strain's invention is as we have heretofore pointed out. These attorneys add: "In the first place Ish's rollers must have the steps thereof arranged with reference to the difference between the grades of the fruit being graded, and the roller will only grade that particular kind of fruit. If the roller is stepped for grading oranges it will not grade nuts. * * * *You can not apply Hutchins' adjustment to Ish's rollers and produce the same effect as can be produced with applicant's device.* Suppose that a closer adjustment *between the grades* is desired, *with applicant's device each roller can be adjusted to make that difference.* With Ish a new roller must be made. Suppose that one of the grades is all right in Ish and a change in the others is desired. One end or the other must be moved, which will throw the edges of the rollers out of line parallel with the other side of the guide and will make a guideway of the V-shaped steps." These remarks clearly point out as the substance of the Strain invention the individual and independent control of the various grading-openings and cannot consistently be claimed to indicate any intention on the part of Mr. Strain to limit himself to any details of construction but to claim broadly this substantive difference in the machines. We cannot find a peg on which counsel can consistently hang an argument that Mr. Strain has in any manner intentionally limited himself or estopped himself from asserting that he is entitled to a liberal construction of claim 1 of the patent in suit.

The contention in reference to claim 10 rests, we believe, on even less ground. Robert Strain made his

application for the original patent and after he had filed his application a man by the name of Charles Rayburn, of Visalia, Cal., also filed an application for patent on a fruit grader embodying precisely the same principle of operation, although showing somewhat different form of some of the mechanical devices utilized, the differences residing more particularly in the design and form of the brackets and adjustments for the individual rollers. By the inadvertence of the Patent Office Examiner [see Transcript, pages 211 and 212] no interference proceeding was instituted to determine whether Strain or Rayburn was entitled to the patent, and each patent was issued upon the claims as drawn by the different attorneys and showing the usual difference in phraseology found in the dictum of different men describing the same thing. Thereafter Robert Strain filed an application for a re-issue for the purpose of contesting the question of priority of invention with Mr. Rayburn, and in his re-issue application adopted, in addition to the claims already granted him, Mr. Rayburn's claims, to form the basis for the interference suit. The result of that suit or proceeding was a judgment of priority of invention in favor of Mr. Strain and the grant of the re-issue patent here in suit, embodying claim 10, which was one of the claims of the original patent to Rayburn. We contend that so far as this suit is concerned such claim must have the same liberal interpretation and construction placed upon it as contended for by Mr. Strain's attorneys in the "Remarks" just quoted, and that this claim 10 must be construed to cover broadly the substance of Mr. Strain's invention.

If we understand defendant's contention in regard to this 10th claim, it is that it must be limited to a machine in which the ends of the rollers are substantially abutting. This contention resting wholly upon the use of the term "end-to-end" as applied to the position of the rollers.

We do not believe that this contention has anything whatever to do with the fact that in the printed copy of this claim in the re-issue patent the three words of this phrase are hyphenated, for in the use of the term in the original Rayburn application [Transcript, page 575, claim 7] the phrase is written "end to end." The contention is based, as we understand it, upon an alleged estoppel by the proceedings in the Patent Office in the matter of the Rayburn application. As originally filed the Rayburn application contained six claims. [Transcript, page 567.] The original claim 1 simply calls for "*a series of sizing rolls independently adjustable to regulate the size of the discharge apertures.*" It does not express any relation of a belt and a roll forming a separating or grading opening and did not point out even this as the substance of the invention. So far as this original claim 1 of Rayburn's application is concerned the claim did not express a complete structure and called for no means whatever to co-operate with the rolls. This is of the utmost importance, as we shall see that Mr. Rayburn redrafted his whole set of claims in order to put them into better form and to express complete combinations, and it is not fair to compare the complete combination of claim 10 of the re-issue patent in suit with an incomplete combination

in which an attempt was made to claim something different from the substance of the Strain invention as it actually existed.

The criticism which we have already made of Rayburn's original claim 1 applies with equal force to his original claims 2, 3 and 4, in which no mention whatever is made of a longitudinally moving member or belt for carrying the oranges along, or any other device whatever; thus these original claims 1, 2, 3 and 4 of Rayburn's patent were not limited to a machine in which a traveling belt is employed, but the oranges might be permitted to roll down an inclined surface. All the claim calls for is a series of rolls independently adjustable, etc. The claims were entirely too nebulous to point out an operative or practical machine. They have, however, in appellant's opinion, no bearing whatever upon the limitation which defendants seek to read into claim 10 of the re-issue patent in suit.

Rayburn's original claims 5 and 6 are open to the same objections as before noted.

A more fatal objection, however, to all six of these original claims is that they did not point out whether the machine was to have these independent rollers mounted one above the other, so as to embody the principle of operation of the impractical machine shown in the prior patent to Hutchins, or whether the machine was to be one in which the rollers were mounted in longitudinal alignment or extension and in combination with elements to embody the mode of operation of the Strain invention.

In his first amendment Mr. Rayburn redrafts seven claims, which are claims four to ten of the Strain re-

issue patent in suit. These seven claims were immediately allowed by the Patent Office and the Rayburn patent issued.

It is to be noted that the Rayburn patent was granted by the Patent Office with the direct statement therein that Mr. Rayburn did not intend to limit himself. The specification says:

“Various changes in the form, proportion and the minor details of construction may be resorted to without departing from the principle or sacrificing any of the advantages of this invention; and I therefore reserve to myself the right to make such changes as fairly fall within the scope thereof.” [Transcript, page 593, lines 60-66.]

As said by this court in *Kings County Raisin & Fruit Co. v. U. S. Consolidated Seeded Raisin Co.* (182 Fed. 59, 64):

“Not only is there nothing in the specifications or claims to indicate that Pettit intended to limit his claims to the precise form described, but the contrary is indicated by the terms of claim 18, and by the language of the specifications, in which it is said that:

“‘Various modifications may be made in the construction shown in the drawings and above particularly described, within the purview of my invention.’”

But there is still another light to be thrown upon the term “end to end” as applied to the rollers by claim 10 of the re-issue patent in suit. Granting for the sake of argument that all that is contained in the proceedings in the Patent Office in the matter of Rayburn’s application is binding upon Mr. Strain and his successors in interest, a proposition of law to which ap-

pellant does not accede, but controverts, inasmuch as the alleged estoppel runs against Rayburn and was not the action of Strain and Strain was held to be the prior inventor and was entitled to a liberal interpretation of his claims, unless he has indicated his intention to limit his claims to the precise form,—still, why did Rayburn use the term “end to end”? It is a descriptive term. What did it describe and by contrast what did it exclude as not within the claim as formulated by him? The patent before him was the patent to Hutchins. [Transcript, page 506.] In the drawings of this patent Mr. Hutchins illustrated a theory of a machine in which the largest size of orange or fruit was first separated. If the fruit were smaller than this size they dropped through this grading opening onto a grading opening below, if of that size they rolled along to the end of the machine, if smaller they continued to drop through until they hit a runway of less opening than their diameter. Rollers are shown in this Hutchins patent, but such rollers are arranged one above the other. Mr. Rayburn then adopted the term “end to end” to distinguish between this arrangement of one above the other. Mr. Rayburn did not mean to limit himself by this term to the rollers abutting. That was not essential or any part of his invention. His invention embodied a mode of operation in which the oranges were carried in a horizontal plane on a belt and the extension of the rollers for his purpose must be end toward end as contradistinguished from superimposed or arranged one above the other. This is the true intendment of the use of this term, and in this same sense the term is equally apt when applied to the

disposition of the individual and independently transversely adjustable rollers of defendants' machines.

The most careful research of both the Rayburn and the Strain applications will fail utterly to disclose any necessity for narrowly construing either claim 1 or claim 10, and these claims should be construed to save to Mr. Strain and his grantees the substantial monopoly of the invention produced by him.

"The claims of a patent are to be fairly construed, so as to cover, if possible, the invention, and thus save it, if it be a meritorious one. In approaching a patent we are to look primarily at the thing the inventor conceived and described in his patent."

Mossberg v. Metter, 135 Fed. 99.

As to the rule in interpretation of claims of patents the Supreme Court says:

"The court should proceed in a liberal spirit so as to sustain the patent and the construction claimed by the patentee himself, if this can be done consistently with the language he has employed."

Klein v. Russell, 19 Wall. 466.

"Patents should be construed in a liberal spirit, to sustain the just claims of the inventor. This principle is not to be carried so far as to exclude what is in it, or to interpolate anything which it does not contain. But liberality, rather than strictness, should prevail where the fate of the patent is involved, and the question to be decided is whether or not the inventor shall hold or lose the fruits of his genius and his labors."

Rubber Co. v. Goodyear, 9 Wall. 795.

As said by the Circuit Court of Appeals for the Seventh Circuit in *Columbia Wire Co. v. Kokomo Co.* (143 Fed. 116, 124):

“The object of the law authorizing the grant is to stimulate invention by this reward to the inventor. It must be administered in conformity with this liberal policy, as a wise exception from the common law against monopolies. So the exclusive privilege of the patentee must be protected to the full extent of his invention and grant.”

As said by the Circuit Court of Appeals for the Seventh Circuit in *Ide v. Trorlicht etc. Co.* (115 Fed. 137):

“Mere changes in the form of a device, or of some of the mechanical elements of a combination, will not avoid infringement where the principle or mode of operation is adopted.”

The most that can be said for defendants' machine is that one element of the combination has been improved, in that the individual and independently adjustable rollers can be also adjusted or slid longitudinally to vary the point at which the given grading opening is arranged, but this does not avoid infringement. The rule is:

“Where an element in a combination is improved, and yet performs the same function in the same way, the use of the combination is infringed.”

Foster v. Moore, 1 *Curtiss* 279.

It seems to appellant that the facts of this case fall squarely within the decision of the Court of Appeals for the Fourth Circuit in *Crown Cork & Seal Co. v. Aluminum Stopper Co.* (108 Fed. 866), in which it is said:

“The court will look through the disguises, however ingenious, to see whether *the inventive idea* of the original inventor has been appropriated,

and whether the defendant's device contains the material features of the patent in suit, and will declare infringement even when those features have been supplemented and modified to such an extent that the defendant may be entitled to a patent for the improvement."

Walker on Patents, section 349, says of combination claims:

"Such a claim is infringed by him who, without ownership or license, makes, uses, or sells any apparatus made up of enough of the described devices to produce the specified result, by the specified mode of operation."

As said by this court in *Los Angeles Art Organ Co. v. Aeolian Co.* (143 Fed. 880, 887):

"If the change introduced by the defendant constitutes a mechanical equivalent in reference to the means used by the patentee, and if besides being an equivalent, it accomplishes something useful beyond the effect or purpose accomplished by the patentee, it will be an infringement as respects what is covered by the patent, although the further advantage may be a patentable subject as an improvement on the former invention."

Mr. Strain's invention was not a mere improvement in detail. It involved an added principle and immediately after he made the invention it went into general use and was immediately adopted by the trade and public and has in fact totally superceded all the old machines. This is set forth strongly in the testimony of all the witnesses.

Mr. Stebler, the complainant, testifies:

"Q. 28. And to what extent since the introduction of the machine of Complainant's Exhibit Patent in Suit

have you been in and throughout the packing houses of California?

A. I have been passing to and fro between all of them either in consultation in my capacity as expert or actually furnishing them these improved machines.

Q. 29. Are you then sufficiently familiar with the orange grading and sizing machines which have been in use in California since 1902 to enable you to state what kinds of machines have been in general use?

A. Yes, sir.

Q. 30. To what extent then, since the introduction of the machine of Complainant's Exhibit Patent in Suit has the machine of said patent gone into use?

A. To the practical exclusion of all others.

Q. 31. When you say 'to the practical exclusion of all others,' what has been your own business experience in the placing of machines of this patent?

A. We have placed them in almost every packing house, not only in California, but elsewhere.

Q. 32. What became of the machines which had been in such packing houses?

A. If they had machines prior to that time they were discarded or thrown away almost invariably.

Q. 33. Have you yourself removed any of such old machines?

A. A great many of them.

Q. 34. What machine has become the standard machine in use in orange packing houses for sizing or grading oranges?

A. Machines of the type shown in Complainant's Exhibit Patent in Suit, having a separately and independently adjustable sizing member for each size or grade of fruit packed.

Q. 48. And to what extent have you put in graders or sizers of any other construction or mode of operation?

A. We have practically put in no others, since we began building these machines.

Q. 49. And based upon your observations on your various trips through the packing houses, what would you say in regard to the number of machines of other constructions which have been installed and used which

did not involve the independent, individual adjustment of the grades as set forth in the patent in suit?

A. There are practically none."

M. R. Whiffin testifies to the displacement of the California or "Ish" machines with machines embodying the Strain invention. He says:

"Q. 15. What was the reason, Mr. Whiffin, for changing from the California grader to the grader you have just referred to?

A. Because it was not practical in the sizing of our fruit.

Q. 16. In what respect was it not practical?

A. Because you could not set any independent size of roller.

Q. 17. Is the setting of each size of roller or grade then a desirable feature in the grading or sizing of oranges?

A. Absolutely, more so now, because the eastern buyers insist on it.

Q. 18. That feature is particularly desirable in order to keep a uniformity of pack, is it?

A. Certainly."

Defendants produced a number of the packers and superintendents of packing houses and the testimony of every one of them shows that *the Strain invention* has entirely driven the old style "Ish" or "California" graders and the old "rope" graders out of use. It is to be noted that although the Ish patent expired in 1908 and it became a free machine in August of that year, yet there has never been a single installation of one of those machines since that date by anyone. A few, less than half a dozen, have been shown to be still in existence. These are used as makeshifts when the regular equipment of Strain machines is for some reason inadequate to handle all the work or these old

California graders are used to size the "culls" which are not packed for the market. There never was a more complete case of an invention driving all other machines out of use than in the case of this Strain invention.

L. E. Tucker says he is the foreman of the packing houses of the Upland Citrus Association, at Upland, Cal. He is called by the defendants. They have one old California grader which is the only one left, *all the others have been displaced with Strain graders. They put in seven of these Strain machines.* The reason was "*it was better to set each size separate*" and they could not do this with the California grader. [Transcript, pages 235-6.] The one California grader that they have is not used in the packing house. It is outside of the packing house and used only for grading "culls,"—the oranges of a quality which are not shipped. [Transcript, page 238.]

T. C. Jameson, called on behalf of the defendants, testifies that the California graders that he originally had have all been displaced with machines embodying the Strain invention. [Transcript, pages 240-251.]

F. K. Adams also testifies to the displacement by the Strain invention of the California graders. [Transcript, page 258.] He testifies that it is advantageous to be able to adjust each grading opening independently. [Transcript, page 263.]

H. E. Walcott, called by the defendants, is a manager of orange packing houses at Pomona, Cal., for the Pomona Fruit Growers' Association; that said association and exchange have not put in any new California graders since 1902; that all the equipment they have

bought since that date has been graders employing the individual and independently adjustable rollers. These machines have all been made either by the appellant, under the Strain patent, or by the defendant, George D. Parker. He testifies that he has been around through the packing houses of California to a great extent and *that from 1902 to 1910 he does not know of a single instance of the installation of a California grader.* [Transcript, page 297.] The Pomona exchange alone has purchased either eight or nine graders during that time.

Each one of these witnesses for defendants testify that an individual or independent adjustment of the several grading openings could not be secured in the Ish or California grader.

In connection with the immediate adoption and general use of the Strain invention and the great utility of this independent and individual adjustment of the several grade openings, attention is called to Mr. Stebler's testimony:

"Q. 112. Will you now describe to us the mode of operation of the device of the patent in suit?

A. You refer to the Robert Strain patent, of course?

Q. 113. Yes, sir.

A. Well, in packing fruit for market, especially oranges, it has been found advisable to assort them for sizes as they come from the orchard, of course, greatly varying in size and I suppose for a number of years prior to my advent into it mechanical devices of various kinds had been employed for this purpose. I have already described the machine that I went to work with and pointed out one of its chief objections, which was inability to adjust and regulate the sizes of fruit as sorted by this machine, owing to its inherent construction. I have also noted the desirability of finding

some means to overcome this objection and when it was presented to me I was not slow in recognizing its value and availing myself of it. To describe the construction of this particular machine I will say that the fruit is fed in to it at one end from some suitable means and as it is carried along the machine the machine itself assort it into varying sizes which is accomplished by allowing the fruit to drop, roll or pass through the graduated apertures between the grading members. All prior machines of this character so far as I know employed this principle but it was the possibility of more completely regulating the sizes as produced by this particular machine that gave it its value and it was the only machine that had ever been placed up to that time in which these sizes could be separately regulated independent of each other, a *fact which was at once recognized by every orange packer. I might say its value in this respect was recognized at the same time also, so much so that it at once became not only the leading machine but about the only machine there was any demand or sale for and it has so continued to the present time.*

Q. 114. What, Mr. Stebler, is the reason for the requirement that the different grades be independently adjustable?

A. The reason is the different varieties of fruit will pack or fill a receptacle differently through a given sized aperture, hence the necessity of regulation here. This is not always equally true on all adjacent sizes and some will require more regulation than others. Then again, each and every packer being engaged in operating his own individual business, has his own caprices as to how his fruit is to be packed and he prefers means whereby he can control this absolutely himself rather than being bound by the caprices of the manufacturers of some given machine in which he is limited to the adjustments provided in this particular machine by the manufacturers and of which he cannot, of course, avail himself as far as he would like.

Q. 121. You say that you are familiar with the defendant's machine. Will you now compare its interrelation of parts and mode of operation of this machine

with the device of the Complainant's Exhibit Patent in Suit?

A. Having previously described the mode of operation of the patent in suit I will say that defendant's machine operates in practically the same manner. The fruit being fed onto that from one end from some suitable means and is carried along the grade-way until it comes in contact with an aperture between the grading members which will allow it to pass through. The grading members in defendant's machine, as in the patent in suit, being composed of a traveling belt and a series of end to end independently adjustable rollers.

Q. 122. Calling your particular attention to the parts marked '36' in Figure 4 of the Exhibit Parker Patent, and also illustrated and shown in Complainant's Exhibit Photo #3, what function do these parts perform in defendant's machine?

A. They merely close up the aperture in the grade-way between the grading elements.

It has been the utilization of Robert Strain's conception that the independent adjustment of the grading openings would give the operator the necessary control of the separation or grading that has caused the Strain and the Parker machines to go into such extended use and to thus totally supplant all other machines.

This proof conclusively shows that the Strain invention was not a mere improvement in detail but was an invention of far-reaching effect and striking novelty, and it should appeal to the court as entitled to liberality at its hands, and in view of the widespread utility and adoption of the invention the court will without question give the patent in suit such degree of liberality in its interpretation of the terms as will secure to the owner of the Strain patent the substantial monopoly of the invention produced by Mr. Strain. This is the

true rule of law, and tested by this rule the defendants' machines are infringements.

The best proof that Robert Strain's invention was not obvious resides in the fact that although from 1891 to 1900 the Ish or "California" graders were in general use and likewise the "rope" graders were in use, no one produced this now seemingly simple but extremely valuable invention, yet the record in this case shows numerous unsuccessful attempts of inventors to produce a successful and practical grader. Appellant himself was engaged for years prior to Robert Strain's invention in the manufacture of the "rope" and of the "Ish" or "California" graders, and is an inventor as well as a skilled mechanic and manufacturer, and it was not apparent to him and he never discovered this invention until Robert Strain produced it, although Mr. Stebler was familiar with all the patents set up by defendants and had been familiar therewith prior to Mr. Strain's invention and none of them suggested it to him. [Transcript, pages 612-619.]

Consideration has been given to the "rope" grader, both as exemplified in the Woodward and Cerruti patents, and to the "Ish" or "California" grader, both as illustrated and shown in the Ish patent and as modified by manufacturers. The only other "prior art" introduced by defendants is contained in copies of letters patent describing the theories of inventors, which theories have never proven practical and which have never had any real standing in the art. Their machines have never been commercially used and the patents are most purely mere "paper" patents. They are entitled to little, if any, consideration, but even if

they were given full credit as practical machines no one of these prior patents either illustrates the principle of the Strain invention or described the substance of the Strain invention. None of these prior patents has any bearing on the scope of claims 1 and 10 as construed by appellant. There is nothing in such paper art to require or justify this court in narrowly construing said claims and limiting them to the exact construction shown by Mr. Strain in his drawings.

Appellant's expert, Mr. Knight, in his testimony, summarizes these patents, in brief, as follows:

"Defendants' Exhibit 'Nelson Patent,' being Letters Patent Number 713,484: This is a machine for sorting fruit according to quality, and the sorting operation is performed by an attendant, the machine not being an automatically operating sizing machine. I find nothing in this patent bearing on the principle of operation of either the Strain machine or the Parker machine.

Defendants' Exhibit 'Hutchins Patent,' being Letters Patent Number 456,092. This is called an assorting machine, but it is actually a sizing machine, and it sizes by passing the fruit along between a longitudinally moving member and a roller, the roller being provided with ribs. The machine comprises a series of superposed elements, two being shown, there being a grading element for each size of fruit. In regard to the operation of any of these elements, the principle of operation is similar to that of the rope and roller graders in general, for instance, the California grader, the Strain grader and the Parker grader, but as a complete machine, comprising a series of end to end elements, the machine is different in that the elements are arranged one above another instead of end to end. This is a good point in regard to compactness, in fact is what the man is driving at, but it is fatally defective on one important requirement of a successful grader, viz.: longitudinal extension in such machine so as to

provide for delivery to packing bins. I therefore conclude that in regard to any single element the principle of this machine is similar to that of the Strain and Parker graders, but in regard to the machine as a whole, *its distinctive principle is different*. I would add that this machine would not be adapted to grading oranges for the reason that the ribs on the rollers would mutilate the fruit so as to render it useless, but in so far as it would work with anything its principle would be the same.

Q. 39. You have referred to the fact that in this exhibit, Defendants' Exhibit "Hutchins Patent," the grading elements are superposed one above the other, while, as you have stated, the grading rollers, constituting the grading element of the patent in suit and of defendants' machine, are arranged end to end. Does this construction illustrated in this Hutchins Patent throw any light, in your opinion, upon the meaning of the term "end to end," as used in the patent in suit?

A. Yes sir. I think that this construction is an example of a construction other than end to end; that is to say, the successive grading elements are not displaced endwise in relation to each other, but transverse; this is to say, one above another. I would like here to call attention to another defect in this construction of Hutchins, which is overcome by the end to end construction. Each grading element of the Hutchins device discharges a portion of the fruit over the end and another portion passes through between the two members of the grading element. Now the portion that passes over the end in the Hutchins device is the separated portion sized by that element and the portion which passes through to the next element is the portion which is not sized or graded by that element. Consequently, if a large number of such elements were used, such as is required in orange packing, the fruit which passes onto the last grading elements would have to pass through all of these grading devices, that is to say, between each set of rollers and belts successively, being subject to a correspondingly great amount of wear and tear in the operation, whereas, with the end to end arrangement, the fruit which passes

through between the two members of each grading element is immediately removed from the machine and does not have to undergo this grading operation again and the other fruit, which does not pass through simply runs to the next grading element.

Q. 40. The oranges would drop by gravity through from one grading element to another in this Hutchins device, until it found the roller and belt which formed an opening slightly less than its size, would it?

A. Yes, sir.

Q. 41. And in your opinion, the successive falls of the oranges in that machine would be a deteriorating agent inducing decay in the oranges?

Mr. Acker: Objected to as leading in the extreme, furthermore, this witness has repeatedly testified that he is not qualified to testify as an expert in regard to the orange industry.

A. Yes, sir.

Defendant's Exhibit "Bailey Patent," being Letters Patent Number 671,646. This is a fruit grader comprising a series of grading elements, each element being double and one member on each side consisting of a vertically adjustable plate carrying a series of discs, the other member of each grading element consisting of the corresponding portion of a rotary disc or ring having inclined or beveled edges so that as the fruit is delivered up onto the ring it is carried on by the ring into contact with the discs "12" of the successive sections and the supporting plates of these discs are adjusted so that the aperture between the rotating carrying discs and the disc carried by the adjustable plates increases in steps, the fruit passing through as soon as it reaches an aperture of sufficient size. In regard to the broad principle of operation, this machine is similar to the California, the Strain and other rope and roller graders. It has, however, inherent defects, which, in my opinion, prevents it from being an equivalent for any of these other straight line graders, its rotary motion leading to inherent difficulties in operation. To secure any considerable capacity in the machine, it would have to be given a considerable angular velocity and this would result in an appreciable cen-

trifugal action on the fruit, tending to increase the outward pressure on the outer side of the machine and decrease the discharging pressure on the inner side; furthermore, this circular shape renders it necessary to use a large number of discs "12" for each section and this does not give a smooth bearing face for the fruit.

Q. 43. In your opinion, Mr. Knight, based upon your observation of fruit graders and your knowledge of oranges and the orange industry, as heretofore testified by you, would or would not a device built in accordance with defendant's exhibit "Bailey Patent," be a practical commercial machine for sizing oranges?

Mr. Acker: Objected to as incompetent, irrelevant and immaterial and on the further ground that the witness has not been shown to possess the qualifications necessary to testify to such fact.

A. My opinion is that it would not be a practical commercial machine.

Defendant's Exhibit "Hutchins Patent No. 2," being Letters Patent Number 465,856. This is similar in construction and operation to the Hutchins patent, above described, and open to the same comments.

Defendant's Exhibit "Huntley Patent," being Letters Patent Number 538,330. I find no special similarity between the construction shown in this patent and that of either the Strain or the Parker machines. The fruit runs by gravity along a guide-way under a roll which is spaced from the guide-way so that the space gradually increases and the fruit is ejected from the guide-way by the friction of the roll moving in such direction as to lift the fruit over the side of the guide-way. This is not the principle of operation of either the Strain or the Parker machines.

Defendant's Exhibit "Burke Patent," being Letters Patent Number 482,294. In this machine the grade-way is formed by two stationary members, each of which is stepped and the fruit is drawn along between said members by a belt carrying fingers, which extend up into the grade-way and push the fruit along. This is not the principle of operation of either the Strain or the Parker machines.

Defendant's Exhibit "Jones Patent No. 2," being Letters Patent Number 442,288. This is strictly a roller machine, the grade-way being formed on one side by a roller, a rotating roller having a series of stepped sections and on the other side by a stationary member which serves as a fixed wall. There is no longitudinally moving member for conveying the fruit along the grade-way and presenting it successively to the different sections or rotating members and the principle of operation is therefore different to that of either the Strain or the Parker machine.

Defendant's Exhibit "Jones Patent," being Letters Patent Number 430,031. This is similar to the Jones Patent Number 442,288, and the same remarks apply.

Defendant's Exhibit "Ish Patent," being Letters Patent Number 458,422. This is the typical rope and roller grader, Ish showing a belt, but stating that he may use a rope. The principle of operation of this patent is that of carrying the fruit by the operation of the longitudinally moving member along the grade-way and presenting it successively to contact with successive roller sections of different diameters so that as soon as it reaches an aperture of sufficient size it will pass through. As far as concerns the act of grading the fruit in any one section, the Ish operation is similar to that of the Strain and Parker machines, but as regards a complete machine providing for the grading of a number of sizes, the machine is different in that the several grades are provided for on a solid roller having stepped sections which sizes are predetermined and invariable. In the machine as illustrated then, there is no provision for individual or independent adjustment or variation of the sizes of successive sections so as to give any desired variation of the grading along the grade-way.

Defendant's Exhibit "Ellithorpe Patent," being Letters Patent Number 399,509. I find nothing in this patent requiring comment as it is of the gravity table type in which the fruit is sized by passing over a table with differently sized holes.

Defendant's Exhibit "Maull Patent," being Letters Patent Number 673,127. This is a rotary grader hav-

ing a central wheel forming the inner member of the grade-way and an outer curved gauge, preferable of volute shape, which forms the outer member of the grade-way, a series of spouts being arranged directly below the grade-way so that as the fruit is carried around by the rotation of the wheel it will fall through between the inner and outer members of the grade-way as soon as it reaches a point where the space is sufficiently great and will fall into the corresponding spout. This is somewhat similar to the Bailey Patent in general principle of operation but it does not have separate sections of the outer member and does not appear to me of any special interest in this connection.

Defendant's Exhibit "Fleming Patent," being Letters Patent Number 475,497. The principle of operation of this machine is entirely different from that of the Strain or Parker or any rope and roller grader, the fruit being carried along by a belt and falls through apertures whose size are controlled by tilting flaps which are let down gradually by passing over an incline.

Defendant's Exhibit "Jones Patent of 1894," being Letters Patent Number 529,032. This is a machine of the rotary type operating by gravity, the grade-way being formed by two concentricly mounted rotating members and the weight of the fruit causing the members to turn so that the fruit is carried through the grade-way from the portion of less width to portions of greater width. I see no special resemblance between this and the Strain or Parker machines.

Defendant's Exhibit "Woodward Patent," being Letters Patent Number 466,817. This is a rope grader, the grade-way being formed by two ropes mounted so that the space between them diverges gradually and the fruit being carried along by the ropes and falling through as soon as it reaches a point of sufficient separation. There is no provision for individual or independent adjustment or variation of successive portions so as to provide for variation in grading and the machine is in that respect different from the Strain and Parker machines as well as in the general respect of being a rope grader instead of a rope and roller grader.

Defendant's Exhibit "Cerruti Patent," being Letters Patent Number 534,783. This is also a rope grader and the same remarks apply to it as to the Woodward patent."

This testimony clearly shows that the substance of Mr. Strain's invention is not disclosed in any of these paper patents and that from none of them would any manufacturer nor did any manufacturer or fruit packer secure the slightest hint of the substance of Mr. Strain's invention. The profert of these patents in this case is aptly characterized by the Supreme Court in *Carnegie Steel Co. v. Cambria Iron Works* (185 U. S. 425):

"This defense presents the common instance of a patent which attracted no attention and was commercially a failure, being set up as an anticipation of a subsequent patent which has proved a success, because there appears to be in the mechanism described a possibility of its having been, with some alterations, adaptable to the process thereafter discovered."

These paper conceptions which have never been practically used are in fact nothing more than mere abandoned experiments. They are experiments which have never gone even beyond the paper stage. It is well settled that

"The unsuccessful experiments of others tend to show the exercise of inventive genius by the one who first produced a successful result."

Ham Co. v. Deitz, 13 C. C. A. 690.

Mr. Knight's testimony is not contradicted by any witness in this case. It stands unimpeached. On the other hand it is corroborated in essential matters and

details by the testimony of Mr. Stevenson [Transcript, page 765]. and Mr. Stebler [Transcript, pages 612-619, 721-723].

In urging Your Honors to protect Mr. Strain's real invention according to the true scope thereof and to construe the claims according to their terms and thus embrace the substance of Mr. Strain's invention, we submit, in the language of this court, in *Parker v. Stebler* (177 Fed. 214):

“We think, in view of the prior art, that the Bryan (Strain) invention marked a distinct step in advance, whereby a notable success was achieved, and that its claims are entitled to a fairly liberal construction.”

His Honor Judge Wellborn, in the District Court, announced his decision orally at the conclusion of the argument and, although counsel for the parties for their use had the decision taken stenographically and reduced to typewriting, no copy thereof has been filed in the case or appears in the record. If counsel for defendants wishes we will not object to the presentation of such report of Judge Wellborn's decision. We do not quote it, not having had an opportunity to consult with opposing counsel in regard thereto. It was very short and did not discuss in detail the issues of the case, simply announcing His Honor's conclusions.

A careful consideration of the defendants' machines demonstrates that they embody every element of each of the claims sued upon. The only difference existing between defendants' machines and the Strain invention, as illustrated in the patent in suit, is the lengthening

out of the machine by the interposition between the grading openings, formed by the individual and independently adjustable rollers and belt, of the telescopic arms which are provided in defendants' machines for what the Parker patent asserts to be an added patentable function, but it is clear that in the separation of fruit, in the control of the grading openings as to size of fruit to be separated thereby, as to the mode or principle of operation in the separation as to sizes, the defendants' machines are practically identical in mechanical elements and in the interrelation of such elements and are identical in the way they co-operate, employing only well known equivalent forms of the adjusting devices and roller-supporting brackets.

For these reasons the defendants' machines infringe the claims and it should be so decreed.

FREDERICK S. LYON,

Solicitor, and of Counsel for Complainant-Appellant.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED STEBLER,

Appellant,

VS.

RIVERSIDE HEIGHTS ORANGE
GROWERS ASSOCIATION (A
CORPORATION) AND GEORGE D.
PARKER,

Appellees.

No. 2232

BRIEF AND ARGUMENT ON BEHALF OF APPELLEES.

At the outset we desire to state that the appellees, defendant below, introduced in evidence in the case a large number of exhibits showing the prior art as disclosed by the patent records, and structures exemplifying certain devices admitted to have been in use for many years prior to the date of the invention covered by the letters patent in suit.

STATEMENT OF THE CASE.

The present appeal is from an order of dismissal on Final Hearing made and entered on the 30th day of September, 1912, by the United States District Court, Southern District of California, Southern Division, in the suit entitled Fred Stebler (appellant herein) vs. Riverside Heights Orange Growers Association and George D. Parker (appellees herein), No. 1562, adjudging claims 1 and 10 of United States Reissue Letters Patent No. 12297, granted Robert Strain, December 27, 1904, for an improved Fruit Grader, not to have been infringed by the Fruit Grader manufactured and sold by George D. Parker (one of the appellees herein) and placed into use by the Riverside Heights Orange Growers Association (the other appellee herein).

The appellees admit title to the letters patent in suit to be vested in appellant.

The assignments of error on appeal (page 791 of the record), though four in number, are referable to two general errors, to wit:

A. Error in dismissing the Bill of Complaint.

B. Error in not holding claims 1 and 10 of the Reissue letters patent in suit or either of said claims to have been infringed by the appellees herein.

The defenses raised in the lower court were:

1. Invalidity of the inventions involved in claims 1 and 10 of the Reissue letters patent in suit by reason of anticipation of the combination called for by said claims.

2. Non-infringement on the part of the defendants (appellees herein) of the invention called for by

either of the mentioned claims of the Reissue letters patent in suit.

The decision of the lower court was rendered by his Honor Olin Wellborn, after an extended argument, four days having been allowed for argument, viz.: September 12th, 13th, 16th and 17th. The Court, after having heard the pleading and proofs and arguments of counsel, and having duly considered the same and being fully advised in the premises, rendered an oral decision on the 17th day of September, 1912. While the decision of the Court does not appear in the record of the case, the following is a true copy of the same as taken down by the stenographer present in Court for such purpose.

DECISION OF THE LOWER COURT.

“Mr. Lyon has made things clear to me, as he always does, and I may say further, from a number of years’ experience with him as a patent lawyer, I find that he combines to an uncommon extent fine mechanical ingenuity and skill with a broad and accurate knowledge of patent law principles, and for that reason his conclusions, when reached after consideration, always demand my most respectful attention. Sometimes I agree with him and sometimes I do not. This is one of the instances where I do not agree with him as to the question of infringement.

“To my mind, the device constructed under the Strain Patent and that under the Parker Patent, or rather the Parker device, the Parker Patent not being involved in this suit, are different substantially, are mechanically different. I am satisfied that it might be said that the con-

struction is different, growing out of this fact, that Mr. Lyon's last remark called my attention to: that it is true that these guide arms in a Parker machine perform exactly the same function in the Parker device that they do in the Strain Patent, that is, so far as constituting one member of the runway, but there is something more to that guide arm. It is a part of Parker's invention by which he gets an enlarged bin capacity. It is a part of the end adjustability of the guide arms and they perform a function in the machine that Parker manufactures which in my mind differentiates it very materially from the Strain Patent. That feature, the end adjustability by reason of the spaces between the rolls in the Parker device and that in the Strain device, it seems to me makes them different and prevents the latter from infringing upon it.

"I think it is all described here in the first claim of the Strain Patent: 'In a fruit grader, in combination a plurality of independent transversely-adjustable rotating rollers; a non-movable grooved guide lying parallel with the plane which passes vertically and longitudinally through the center of said rollers, said rollers and guide forming a fruit runway.' (The Court emphasizing the words 'said rollers and guide forming a fruit runway.') That is the fixed member and the roller form a runway. That, in my mind, cannot be fairly said of the Parker Patent. Parker has introduced these guide arms, which Mr. Stebler and Mr. Lyon denominate here 'the space fillers.' They are something more than that. They are a part of the device for getting that increased room where there is an excess of oranges of one size.

"I don't think that feature—in the Strain Patent one element is that the roller and guides shall form a fruit runway. That is not true in the Parker invention. He has introduced the guide arm in that machine and they have an

apparent function to perform aside from forming a part of the runway.

“Claim 10 recognizes the rollers to be end to end rollers, but in that particular I don’t see that there is any difference between 1 and 10, because one contains the expression that the rollers and guide form the fruit runway.

“I will not take further time to express my opinion on that. I have listened to both of you with a great deal of pleasure. The bill will be dismissed. Fortunately, the record is in such shape, however, that it will be easy to have a review of my opinion and I am always glad to have my opinions reviewed and will do anything I can to assist you in this case.”

From the above it will be noted that the lower court differentiated the device claimed to be an infringement (hereinafter termed the Parker Machine) by reason of the fact that—

(A) The Parker Machine performed a function entirely different and distinct from that accomplished by appellant’s patented machine.

(B) The Parker Machine does not embody the principle of operation called for by the grader of the Reissue letters patent in suit.

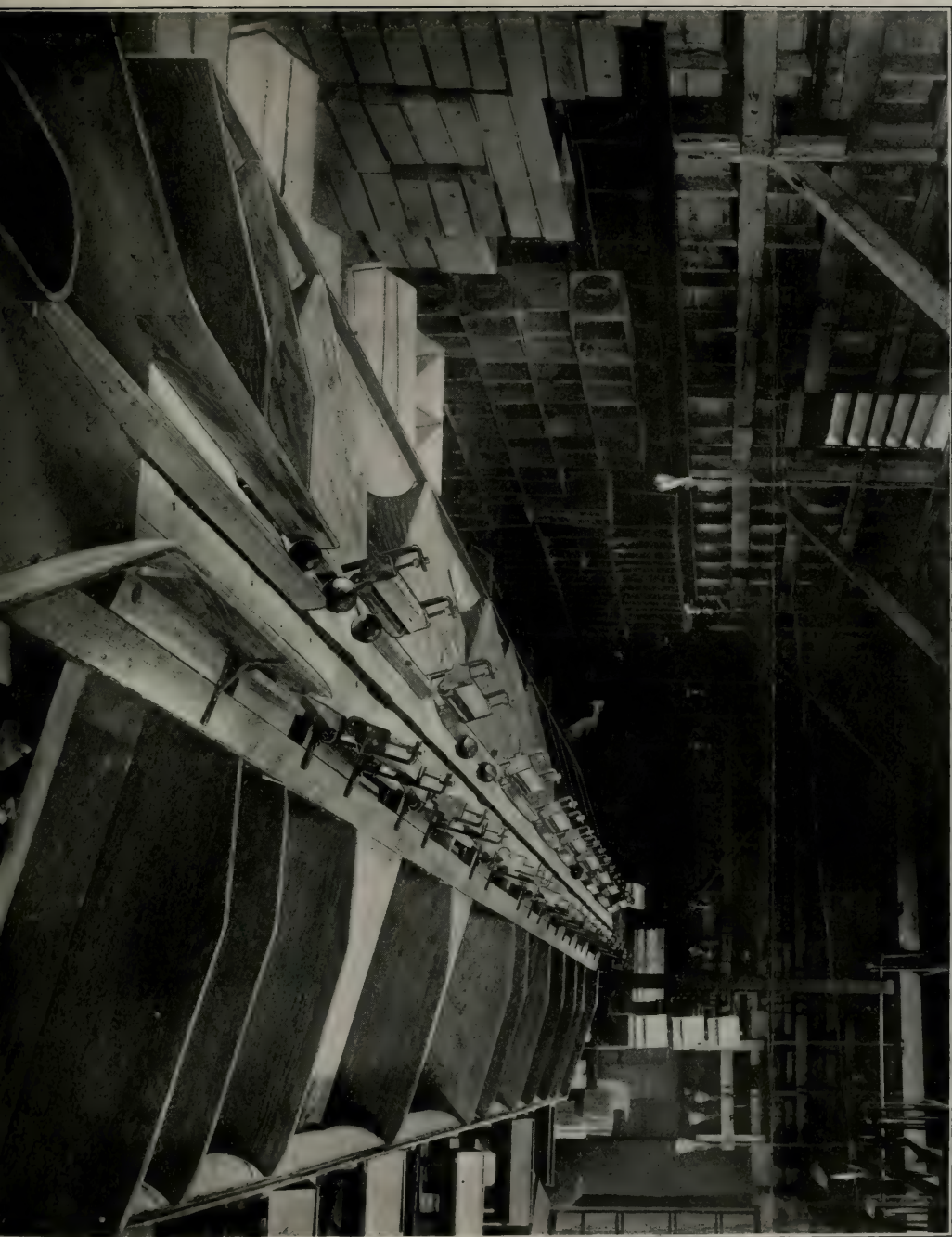
(C) The Parker Machine does not embody in its structural arrangement and working parts the combinations of inter-working elements called for by the combination embraced in claims 1 and 10 of the Reissue letters patent in suit.

(D) That claims 1 and 10 of the Reissue letters patent in suit are restricted in their scope to the end to end arrangement of the rollers forming the rotary member of the fruit runway of the grader.

Before giving consideration to the patent in suit, we deem it advisable, at this time, as matter of interest and in order that the position which the fruit graders occupy in connection with the fruit packing houses, to present a cut of each machine involved herein, and on the opposite page is a cut illustrating one of the appellee's machines situated within one of the fruit packing houses of Southern California, the cut being made from a photograph of the grader as actually installed and placed into operation.

This cut clearly illustrates a series of aligned non-rotary grading units, which constitute the outer wall of the runway for the fruit and against which the fruit impinges as carried through the machine, the traveling belt for propelling the fruit, the bins for receiving the sized fruit as discharged from the controlled openings of the grading units, and the guide arms extended from each of the separated grade units. It will be noted that this Grader (known as the Parker Machine) is not provided with a continuous substantially unbroken outer rotary wall member for the fruit runway; that in the structural arrangement of its working parts there is no provision for a rotary member composed of *end to end* grading rollers constituting an outer parallel member of the fruit runway; in fact, no such rollers being utilized in the machine, and further there is no provision made for a non-movable grooved guide, mentioned in the patent in suit as constituting one of the parallel members of the fruit runway.

The only rotary element employed in the Parker machine consists of the small roller situated within the discharge opening of each grade unit frame, the



Stebler machine



same being adjustably held therein, and serving as an elastic buffer or cushion for preventing injury to the fruit as passed through the sized opening of the grade unit frame. This machine is protected by United States Letters Patent, and the working and construction thereof will be fully considered later on.

We also illustrate by cut from a photograph taken of one of the Stebler graders of the patent in suit as installed by appellant in one of the packing houses in Southern California. A mere glance is sufficient to show that the machine is constructed exactly as called for by the drawings, description and claims of the letters patent. There is present the non-movable grooved guide called for by the letters patent in suit, the rope working in the groove thereof, the outer rotary member consisting of a plurality of *end to end* rollers, and the individual belts for positively driving each of the rollers for imparting rotation thereto. The non-movable grooved guide lies parallel with the plane which passes vertically and longitudinally through the center of the series of end to end rollers comprising the outer rotary member of the fruit runway, and the said grooved guide and the parallel series of end to end rollers constitute the fruit runway of the machine, each of the end to end rollers being positively driven by the drive belts disclosed in the cut.

Comparing the cut of the Stebler (appellant's) machine with that of the Parker (appellees) machine, it is noticeable that the latter differs structurally from the former in every respect. There exists no similarity between the machines, neither do they operate on the same principle. However, these fea-

tures will be considered more fully hereinafter, the cuts being given at this time merely that the general arrangement and appearance of the machines may be understood.

PATENT IN SUIT.

The alleged invention of the letters patent in suit relates to an apparatus for the grading of fruit, and before attempting an analysis of claims 1 and 10, we must fully understand the specification of the letters patent in suit in order to comprehend the meaning and import of the said claims.

The Reissue letters patent in suit—complainant's Exhibit "Patent in Suit"—is found on pages 164-168 of the printed record. The apparatus therein disclosed relates to an improvement in graders, and the invention covered thereby as we are told by the specification "relates to that class of graders designed to assort fruit, vegetables, such as potatoes, and nuts into lots of different sizes; and the objects thereof are to provide a machine for that purpose which is adjustable to a number of grades and which will prevent the fruit from bruising or being crushed."

The invention is thus set forth for the grading of fruit generally, its use not being restricted to any given class of fruit. Attention is directed to this phase of the case at this time, due to the fact that throughout the whole course of the case there has been a studied effort on the part of appellant to build up a claim of invention for the patented grader by reason of the fact that its use has been applied to

the grading of oranges, and by such claimed use for the machine the endeavor is made to dispose of any prior patent designed for the grading of fruits, vegetables, and nuts into lots of different sizes, where such prior patented devices are not shown as being employed for the grading of oranges. Such was the main contention in the lower court against the pertinency of many of the references as anticipatory matter, and we apprehend the same line of argument will be followed at this time. An answer to any such contention is found in the fact that the patentee Strain did not so restrict the use of his alleged invention, for, as above pointed out, he wished the machine to apply to the grading of all kinds of fruits, vegetables and nuts. In fact, the only mention of the word "oranges" is found in the statement, "In orange grading there are usually nine grades," and this statement is only expressed to advise as to the usual number of grades into which one class of fruit is usually divided.

The patent itself defines the fruit grader as being composed of two parallel members, viz.: an inner non-movable grooved guide in the groove of which works an endless rope for propelling the fruit through the runway of the grader, and an outer rotary member comprising a series of longitudinally disposed rollers. The non-movable grooved guide and the series of longitudinally disposed rollers form the fruit runway of the grader. The rollers constituting the outer wall or outer member of the parallel members of the fruit runway, are known as power driven rollers, that is, each roller is driven from a power shaft by means of a power

transmitting belt, the power shaft being driven from the drive means which actuates the endless conveyor rope working in the grooved non-movable guide member of the fruit runway. It is essential that the rollers of the grader of the patent in suit be power driven in order to force the fruit passing through the runway into and through the proper grade space, and it is absolutely essential for the proper working of the patented machine to conform to the disclosure of the patent in suit that the rollers constituting the outer member of the runway be disposed end to end, in order to produce substantially an unbroken rotary outer wall member for the runway.

For convenience, a cut of the drawings forming a portion of the Reissue letters patent in suit is herewith presented.

A description of the grader illustrated is set forth in the specification as follows:

Fig. 1 is a perspective view of a fragment of my machine arranged for grading oranges or lemons. Fig. 2 is a cross-section.

In the drawings, my machine is designed as a double grader—that is, two graders arranged side by side on the same frame, one side being a duplicate of the other side.

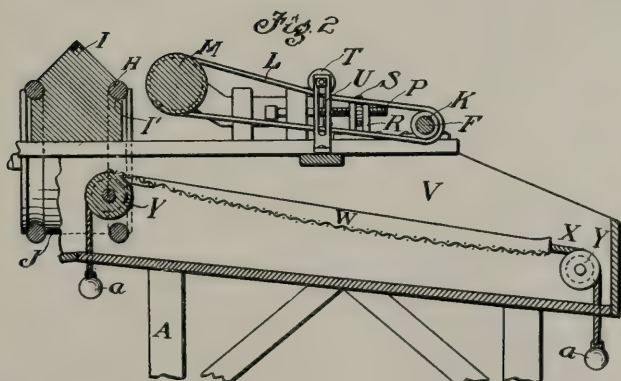
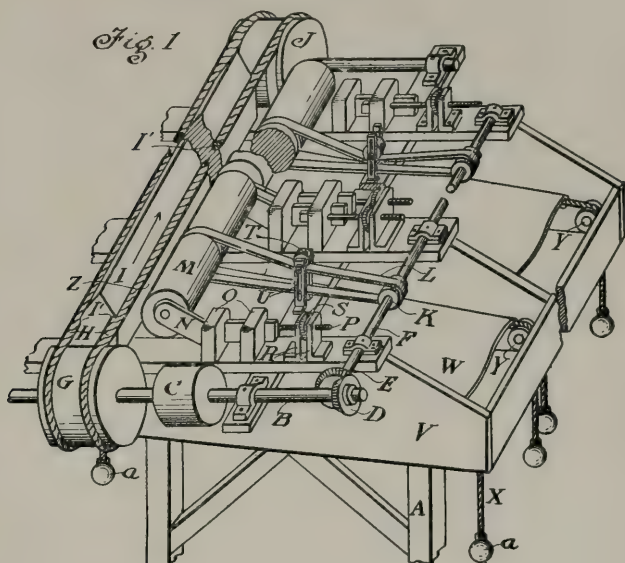
A represents the frame of the machine, on the top of which at one end of the machine, preferably at the upper end, is transversely mounted the driving-shaft B, carrying the driving-pulley C, by means of which motion is imparted thereto. When arranged as a double grader, on each end of the driving-shaft is rigidly mounted driving bevel-gears D, which mesh with driven bevel-gears E, rigidly mounted on the longitudinally-extending driven shafts F. On the driving-shaft is rigidly mounted the rope-

No. 12,297.

REISSUED DEC. 27, 1904.

R. STRAIN.
FRUIT GRADER.

APPLICATION FILED OCT. 21, 1903.



Witnesses:

William H. H. H.

Frederick H. H.

Inventor:

Robert Strain

by *Townsend Bros*
Attys.

driving drum G, which imparts motion to ropes H, which travel in the direction indicated by the arrow in Fig. 1, that is, from head to the foot thereto, in grooves I¹ in guide I, which forms one side of the fruit runway. These ropes pass over pulley J at the lower end of the machine. On the driven shafts F are rigidly mounted a number of driving-pulleys K, which drive belts L, that pass around the grading-rollers M, which are revolvably mounted in adjusting-arms N, which have a longitudinal movement in guide-blocks O, affixed to the top of the frame. To each of these adjusting-arms is affixed a threaded bolt P, which passes through two stop-blocks R, between which is an adjusting-nut S on bolt P in threaded contact therewith, by the rotation of which the grade-rollers are moved toward or from the guide. Affixed to the top of the frame are band-tighteners to tighten the bands when the grade-rollers are moved away from the guide. These band-tighteners are formed of a pulley T, adjustably mounted in slotted uprights U, affixed to the frame. Below the grade rollers are as many bins V as there are grade-rollers, which are adapted to hold the fruit which will pass between the grade-roller and the guide. In order to prevent the fruit from being bruised, in each bin is mounted an apron W, of strong cloth, the inner end of which is higher than the outer, so that the fruit will roll to the outer end of the bin, where it has but a short distance to fall to reach the bottom of the bin. Each edge of these aprons is fastened to a rope X, which passes over small pulleys Y, affixed to the side of the bin, and each end thereof has a weight *a* to hold the apron taut and to keep it in position. In the operation of my machine the first roller, or that nearest to the shaft B, is adjusted so as to permit the smallest grade of fruit to pass between the roller and the guide. The next roller is adjusted for

the next larger grade, and so on for each successive grade. In orange-grading there are usually nine grades. Motion is imparted to the driving-shaft to cause a rope H to travel in a groove I¹ in guide I in the direction indicated by the arrow. This causes the grade-rollers to revolve so that the top of the roller travels away from the guide. The fruit is fed into the runway between the guide and the grade-rollers by any suitable device (not shown) in the usual manner.

It will be observed that as the grade-rollers are adjustable the distance between the roller and guide can be made small or large to adapt the machine to grading small nuts or fruits or large nuts or large fruits. It will also be observed that the ropes carry the fruit toward the lower end of the machine and at the same time the grade-rollers are revolving, so as to keep the fruit from sticking in the runway, thereby avoiding any tendency to crush the most delicate fruit. It will also be observed that the inner end of the apron gives a soft yielding surface for the fruit to fall upon a short distance below the roller, thus preventing any danger of its bruising. As the fruit rolls to the outer end of the apron it falls into the bottom of the bin, and as the end fills up the apron can be moved toward the inner end of the bin, the weights providing for such adjustment. The fruit is packed from the outer end of the bin. By having short grade-rollers separately adjustable very fine grading may be done and more than one roller may be adjusted to the same grade, if desired. If there should be a large quantity of the fruit of a single grade intermixed with a small quantity of fruit of different grades, this feature is very desirable, as a number of bins may be filled with fruit of the same grade.

THE CLAIMS, BASED ON THE PATENT ALONE.

The said Reissue letters patent contain ten claims, but in the present action infringement is alleged only as to claims 1 and 10, which read as follows:

1. In a fruit-grader, in combination a plurality of independent transversely-adjustable rotating rollers; a non-movable grooved guide lying parallel with the plane which passes vertically and longitudinally through the center of said rollers, said rollers and guide forming a fruit runway; a rope in the groove in said guide and means to move said ropes.

10. In a fruit-grading machine, a runway formed of two parallel members, one of said members consisting of a series of end to end rolls, brackets carrying the rolls, guides for the brackets, and means for adjusting the brackets upon the guides, substantially as set forth.

Taking each of these claims separately, we find claim 1 calls for the following elements in combination:

1. A plurality of independent transversely adjustable rotating rollers.

2. A non-movable grooved guide lying parallel with the plane which passes vertically and longitudinally through the center of said rollers.

3. That the rollers and guide shall form the fruit runway.

4. That a rope shall travel in the groove of the non-movable guide and means be provided for moving said rope.

Claim 10 calls for a fruit grading machine comprising the following combination:

1. A runway formed of two parallel members.
2. One of said members is required to be formed of a series of end to end rollers.
3. Brackets carrying the rollers.
4. Guides for the brackets.
5. Means for adjusting the brackets.

Referring to the drawings of the specification of the letters patent, we are told that the rotating member forming the outer member of the fruit runway mentioned in claim 1 as a "plurality of independent transversely adjustable rotating rollers" comprise a series of end to end rollers, that is, the end of each successive roller substantially abuts the end of a preceding roller so as not to leave what has been termed in the testimony "a non-available grading" space between the rollers. In other words, the arrangement is such that fruit leaving one roller of the rotary member of the fruit runway immediately moves onto the next roller, and so on throughout the length of the grade or fruit runway. The specification states that there is a roller for each grade of fruit, consequently, where employed in connection with the grading of oranges nine end to end grading rollers are employed. Without question, from the disclosure of the letters patent themselves the first requirement of the first element of claim 1 is that the series of grading rollers shall be arranged end to end, also that said rollers shall be transversely adjustable, and it is required that the "rotating" rollers shall be power driven, for the specification states "On the driven shaft F are rigidly mounted a number of driving pulleys K, which drive belts L,

that pass around the grading rollers M, which are revolvably mounted in adjusting arms N," lines 43 to 47, p. 1, of the printed specification, also "Motion is imparted to the driving shaft to cause a rope H to travel in a groove I¹ in guide I in the direction indicated by the arrow. This causes the grading rollers to revolve so that the top of the roller travels away from the guide * * *." "It will also be observed that the ropes carry the fruit toward the lower end of the machine and at the same time the grade rollers are revolving so as to keep the fruit from sticking in the runway," lines 82, p. 1 to 1, p. 2, of the printed specification.

The second element of claim 1 is the non-movable grooved guide. This element of the combination with the plurality of *end to end* rollers is limited to an exact arrangement, viz.: that it shall not only lie parallel with the grade rollers, but parallel with a plane which *passes vertically and longitudinally through the center of said rollers*.

It is the limitation in claim 1, that the *end to end* arrangement of the rollers and the non-movable groove guide parallel to the said rollers and in plane which passes *vertically and longitudinally through the center* of the rollers shall constitute the fruit runway which the appellant seeks to have removed from the claim, so that the claim may be expanded as though it read as follows:

"In a fruit grader, in combination a plurality of independent adjustable rollers situated within the sphere of the fruit runway, a non-movable guide, and means for propelling the fruit through the runway."

Claim 10 of the letters patent in suit is limited by the wording thereof to the end to end arrangement of the rolls. This claim differentiates from claim 1 by the non-restriction as to what may comprise the parallel member of the runway opposing the member of the runway composed of the end to end rollers. However, it does specify the arrangement of the grading rollers relative to each other and the specific construction of the brackets carrying the said rollers and the means for adjusting the said brackets.

As will be hereinafter shown, appellees' machine does not embody in its structural arrangement of co-operative parts end to end rollers as one of the grading members of the fruit runway, as called for by claim 10 of the Reissue letters patent. It does not embody therein a fruit runway composed of such arrangement of rollers in combination with a non-movable grooved guide lying parallel with the plane which passes vertically and longitudinally through the center of said rollers, as called for by claim 1 of the said letters patent, and appellees' machine does not embrace in its arrangement of working parts the "brackets carrying the rolls, the guide for the brackets and means for adjusting the brackets upon the guides," in combination with "a series of end to end rolls," as called for by claim 10 of the letters patent in suit.

It is the limitation of the "end to end" arrangement of the rolls, and the specified supporting brackets, guides for the brackets, and the adjusting means therefor, which the appellant seeks to have read out of claim 10.

The wish of appellant is to have the claims construed and enlarged as follows:

Claim 1. In a fruit grader, in combination a plurality of independent adjustable rollers, a non-movable guide lying parallel with said rollers, and means for propelling the fruit through the runway.

Claim 10. In a fruit grading machine, a runway formed of two parallel members, one of said members having embodied therein a plurality of longitudinally disposed adjustable rollers, and means for adjusting said rollers.

The foregoing claims express that which appellant seeks for the inventions of the combinations of the claims alleged to have been infringed, for it is only by so expanding the claims that appellees' device can be made to fall within the claims of the patent in suit. Against any such enlargement of the involved claims, we most earnestly protest. The claims in suit clearly express that which they endeavored to express, for they are not ambiguous in any manner. Again, the combinations called for by the claims cover the only form of co-operative working elements disclosed by the letters patent, and the combinations were expressed with the limitations therein to induce an allowance of the claims.

It is well known that the claims of letters patent will not be enlarged merely for the purpose of making out an infringement. In the present case, not only is the appellant prohibited from so expanding the invention by reason of the involved claims clearly expressing that sought to be protected, but due to the further fact that during the prosecution of the application which eventuated in the grant of the

original letters patent of the Reissue letters patent in suit and the application of the letters patent which resulted in the grant of claim 10 of the said Reissue letters patent, the effort was made to secure the allowance of claims commensurate in scope to the above suggested claims, but the Patent Office refused to grant an allowance of any such claims. It was only after the broad claims of the application had been abandoned and the specific claims filed, was applicant enabled to secure an allowance of the claims herein involved.

The original letters patent of which the patent involved is a reissue, were granted June 9, 1903, on an application filed by Robert Strain, said letters patent being No. 730412, and appearing in the record in connection with complainant's exhibit "Original File Wrapper," pp. 169-190, the printed letters patent appearing on pp. 188-190 of the record. The application of the said original letters patent as filed in the Patent Office contained the following claims:

1. In a fruit grader, one or more transversely adjustable rotating rollers; in combination with a guide lying parallel with the rollers, said guide and rollers forming a fruit runway; and ropes in said guides.

2. In a fruit grader, a plurality of independently, transversely adjustable rotating rollers; in combination with a longitudinal guide lying parallel to said rollers, said guide and rollers forming a fruit runway; a rope in a groove in said guide adapted by the movement thereof to cause the fruit to travel along said runway; a fruit retaining bin below each roller having an apron therein to break the fall of the fruit.

3. In a fruit grader, one or more transversely and independently adjustable rotating rollers.

4. In a fruit grader, a plurality of independently, transversely adjustable rotating rollers in combination with a longitudinal guide lying parallel to said rollers, said guide and rollers forming a runway for the fruit; a rope in a groove in said guide, adapted by the movement thereof to cause the fruit to travel along the runway; a fruit retaining bin below each roller.

5. In a fruit grader, one or more bins below the graders each having a yielding soft apron therein elevated above the bottom of the bin.

6. In a fruit grader, a grooved longitudinal guide, a rope in said groove; means to impart movement to said rope; one or more rollers lying parallel to said guide revolubly mounted in arms transversely adjustable; means to adjust said arms comprising a threaded belt passing through two stop blocks; a nut on said bolt in threaded contact therewith between said stop blocks; and means to revolve each of said rollers, comprising a belt passing around said roller and a pulley mounted on a shaft; and means to impart motion to said shaft.

Particular attention is called to claim 1 of said series of claims, inasmuch as claim 1 of the reissue letters patent in suit differentiates therefrom only by incorporating into the claim the limiting expression "independent," as applied to the adjustable rollers; and the expression, "plane which passes vertically and longitudinally through the center of," as applied to the location of the guide, and the further limitations that the guide shall be non-movable and grooved, and that the rollers and guide shall form the fruit runway of the grader.

Original claim 2 is the same as claim 1 of the reissue letters patent, with the exception that the limitation of the guide being situated in a "plane which passes vertically and longitudinally through the center of" was added to claim 1 of the reissue letters patent to induce an allowance of the claim.

The first five originally filed claims were rejected by the Patent Office, their rejection acquiesced in by applicant Strain and the claims cancelled. For the cancelled claims, the following claims were substituted:

1. In a fruit grader in combination a plurality of independent transversely adjustable rotating rollers; a non-movable grooved guide lying parallel with the plane which passes vertically and longitudinally through the center of said rollers, said rollers and guide forming a fruit runway; a rope in the groove in said guide and means to move said rope.

2. In a fruit grader a plurality of independently transversely adjustable rotating rollers, said rollers being adapted to form one side of the fruit runway of the grader.

3. In a fruit grader having a bin means to break the fall of the fruit from the grading way comprising a yielding soft apron above the bottom of the bin and extending under the grading way, said apron having the end thereof under the grading way at a higher elevation than the other end; the lower end extending to near the outer side of the bin.

Of these claims, the first claim appears as claim 1 of the reissue letters patent, and in all respects is the same as original claim 1 with the limitations applied thereto to induce an allowance thereof. Of this

series of claims, 1 and 3 were allowed. Claim 2 of the series of amended claims endeavored to cover broadly as one member of a fruit runway, "a plurality of independently transversely adjustable rollers." This claim was rejected and cancelled by the patentee. However, a comparison thereof with claim 10 of the reissue letters patent in suit is requested. It will be noted that claim 10 calls for the same elements as rejected claim 2, with the exception that the rollers shall constitute one member of the fruit runway and are limited to the extent that the said rollers shall be arranged "end to end," and into the claim is brought the specific means for supporting the rollers and adjusting the same toward and from the companion member of the runway. Without these limitations an allowance of the claim was refused, consequently, appellant cannot be credited at this time when arguing that the expression "end to end" disposition of the grading rollers does not restrict the same to the end to end arrangement of the rollers shown and described in the reissue patent in suit. If such limitations deliberately placed into the claim for the purpose of inducing an allowance thereof and which succeeded in doing so does not serve to so restrict the claim, then the claim must be construed to mean that which the Patent Office refused to grant and which was cancelled by the applicant.

The limitation placed into claim 1 to induce an allowance thereof and the limitations placed into claim 10 for the same purpose, cannot, at this time, be ignored or eliminated in order to enlarge the scope of the said claims.

On the cancellation of claim 2, of the second series of claims filed, the original application filed by Strain was passed to an allowance, and the letters patent No. 730412, record p. 188, issued with the three allowed claims of which the amended allowed claim 1 is the same as claim 1 of the reissue patent in suit.

HISTORY OF THE REISSUE PATENT IN SUIT.

During the pendency of the original application of Robert Strain, there was filed in the United States Patent Office on August 18, 1902, by one Charles Rayburn, an application for letters patent for an improved fruit grader. The file wrapper of this application appears as Defendants' Exhibit "File-Wrapper Rayburn Application for Letters Patent," record pp. 559-578, and the letters patent issued on said application appears between pp. 591-594 of the record.

The Rayburn application was filed with the following claims:

1. A fruit sizing machine having a series of sizing rolls independently adjustable to regulate the size of the discharge apertures, substantially as described.
2. A fruit sizing machine having a series of sizing rolls, brackets carrying the rolls, and means for independently adjusting each bracket and roll, substantially as specified.
3. Fruit sizing mechanism comprising a relatively stationary member, a series of parallel sizing rolls, and means whereby each roll may be

adjusted toward and from said stationary member independently of the other rolls, substantially as set forth.

4. Fruit sizing mechanism comprising a central member, parallel longitudinal rows arranged on opposite sides thereof, and means for independently adjusting the rolls, substantially as and for the purpose specified.

5. Fruit sizing mechanism comprising co-operating members, one of said members consisting of a series of rolls independently adjustable toward and from the other member, substantially as described.

6. Fruit sizing mechanism embodying a drive-shaft, co-operating sizing members, one consisting of a series of rolls independently adjustable toward and from the other member, belts connecting the shaft and rolls, and means for maintaining the requisite tautness of the belts, substantially in the manner set forth.

These claims (like the broad claims filed in connection with Strain's original application) were rejected by the Patent Office on reference to prior issued United States letters patent, which letters patent, and equally so others of the prior art, will be given consideration hereinafter.

It will be noted that by claims 1, 2, 3, 4, and 5 applicant Rayburn endeavored, like applicant Strain, to cover broadly one member of the fruit runway as comprising a series of independently adjustable grading rolls, provision for the adjustment of which was to enable the outlet aperture for the fruit being graded to be varied. As stated, these claims were rejected, equally so claim 6 of the series of claims, and the rejection thereof acquiesced in by

the applicant by the cancellation of the claims and the insertion *in lieu* thereof the following claims:

1. In a fruit sizing machine, a runway for the fruit comprising co-operating parallel members, one of said members consisting of a series of rolls arranged end to end and disposed progressively at different distances from the other member, forming communicating fruit-discharging apertures of progressively different widths along the length of the runway, means for adjusting each roll independently to vary the size of the aperture formed thereby, and means for driving the rolls, substantially as described.

2. In a fruit sizing machine, a supporting frame, a runway for the fruit comprising co-operating parallel members, one of said members consisting of a series of rolls arranged end to end and disposed progressively at different distances from the other member, forming communicating fruit discharging apertures of progressively different widths along the length of the runway, brackets carrying the rolls, means mounted upon the frame for moving each bracket and adjusting each roll independently to vary the size of the aperture formed thereby, and means for driving the rolls substantially as described.

3. In a fruit sizing machine, the combination with a supporting frame, of a fruit runway formed by a relatively stationary member and a longitudinal series of rolls arranged end to end at different distances from said stationary member, thus providing communicating spaces of progressively varying sizes for the discharge of the fruit, means for independently adjusting the rolls with relation to said stationary member, means for driving the rolls, and means for positively feeding the fruit along the runway, substantially as set forth.

4. In a fruit grading machine, the combination with a supporting frame, of a fruit runway comprising a relatively stationary member and a series of rolls disposed in parallel relation to said member and arranged end to end at different distances from the stationary member, forming communicating passages of progressively varying sizes along the runway for the discharge of the fruit, means for adjusting the rolls with relation to the stationary member, means for driving said rolls, and a traveling belt moving in parallel relation to the stationary member and rolls for positively feeding the fruit along the runway, substantially as described.

5. In a fruit grading machine, the combination with a supporting frame, of a central longitudinal divider, forming one side of two parallel runways, a series of rolls disposed on each side of the divider and arranged end to end at different distances from the divider, forming therewith a runway having progressively varying discharge spaces for the fruit, means for adjusting the rolls of each series toward and from the common divider, means for driving the rolls, and belts disposed on opposite sides of the divider for positively feeding the fruit along the runways, substantially as described.

6. In a fruit sizing machine, the combination with a supporting frame, of a longitudinal shaft, transverse shafts, one of which is adapted to be driven from a suitable source of power, a runway comprising a relatively stationary member and an adjustable member consisting of a series of rolls arranged parallel therewith and disposed end to end and at different distances from the stationary member, means for independently adjusting the rolls with relation to the stationary member, means for driving the rolls from the longitudinal shaft, and a belt connected with the transverse shafts for positively feeding the fruit along the runway, substantially as set forth.

7. In a fruit grading machine, a runway formed of two parallel members, one of said members consisting of a series of end to end rolls, brackets carrying the rolls, guides for the brackets, and means for adjusting the brackets upon the guides, substantially as set forth.

The application of Rayburn was allowed with the foregoing amended claims and letters patent No. 726756 were issued for the invention covered by the amended claims under date of April 28, 1903, more than one month prior to the issuance date of the Strain original letters patent No. 730412.

After the issuance of the Strain original letters patent under date of June 9, 1903, the assignees of patentee Strain (Fred Stebler, appellant herein, and his partner, Austin A. Gamble) decided to apply for a reissue of the Strain letters patent, and filed such reissue application in the United States Patent Office under date of October 21, 1903. The reissue application was filed solely for the purpose of enlarging the claims of the original letters patent and to secure the claims granted in connection with the issued letters patent of Charles Rayburn. The only claims filed in connection with the Strain reissue application in addition to the claims of the original letters patent are those appearing as claims 4 to 10 of the reissue letters patent, and these are identical with and in fact an exact copy of the seven claims contained in the Rayburn issued letters patent. After the filing of the Strain reissue application, an interference was declared in the United States Patent Office with the issued letters patent of Charles Rayburn, the issue of interference embrac-

ing claims 4 to 10 of the said reissue application of Strain, and all of the claims contained in the Rayburn issued letters patent.

This interference was apparently decided in favor of Robert Strain, with the result that Strain's reissue application was passed to an allowance and the reissue letters patent herein involved issued under date of December 27, 1904.

The assignees of Robert Strain and the filers of the reissue application were content to accept the claims contained in the Rayburn issued letters patent subject to all restrictions and limitations placed thereon by the Patent Office during the prosecution of the application which eventuated in the grant of the Rayburn letters patent with which they sought and obtained an interference, for at no time during the prosecution of the reissue application was any effort made to secure an allowance of claims other than those contained in the Rayburn letters patent. By so accepting these claims, they became bound by such equities as attach thereto, for by this acceptance of the claims as measuring the scope of the invention, they are bound by the acquiescence of Charles Rayburn in the rejection of the broad claims of his application as filed and are estopped at this time from asserting for the claims a scope greater than could have been urged for the same by patentee Charles Rayburn. So far as these claims are concerned, appellant stands in the same position as an assignee of Charles Rayburn, and can not at this time ask for an enlargement of the claims to cover in substance that which was denied the applicant in the Patent Office, and cancelled from the application. Of the series of

claims allowed for the Strain reissue application, the 10th claim of the reissue letters patent in suit is identical with the 7th claim of the Rayburn letters patent.

This claim is therefore limited by the file-wrapper proceedings of the application which eventuated in the grant of the Rayburn letters patent, in exactly the same manner as claim 1 of the reissue letters patent is limited by the file-wrapper disclosure of the Strain original application. Such being the case, appellant cannot at this time ask that the limitation "end to end" disposition of the grading rolls be disregarded and an "end toward end" disposition be substituted therefor, for this limitation, together with the specific form of the bearing brackets for the rolls and the adjusting means for said brackets was put into the claim to induce an allowance thereof over the references cited in anticipation of the broad claims originally filed by Rayburn covering any disposition of a series of rolls forming one member of the fruit runway.

ENLARGEMENT OF CLAIMS IN SUIT.

Appellant realizing that the appellees' device does not fall within the scope of claims 1 and 10 of the reissue letters patent as therein expressed, wishes such limiting expressions removed or ignored as prevents appellees' machine from falling within the charge of infringement, but all limitations retained which will save the claims from being held invalid by reason of anticipation. If one limitation is removed from the claim, all others must likewise be elimi-

nated. However, limitations incorporated into a claim to induce an allowance thereof, cannot afterwards be disregarded for the purpose of making out a case of infringement nor for any other purpose.

It is elementary that the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the Patent Office when the terms of the claim in a patent are clear and distinct, as they should always be. A patentee in a suit brought upon the patent is bound by the claims thereof, and he can assert nothing beyond the term thereof.

The claim is a statutory requirement prescribed for the purpose of making the patentee define precisely what his invention is; and it is unjust to the public as well as an evasion of the law to construe it in a manner different from the plain import of its terms.

Keystone Bridge Co. vs. Phoenix Iron Works,
95 U. S. 274.

White vs. Dunbar, 119 U. S. 47.

“Where the language in the specification of the patent is clear and unambiguous it must speak its own construction.”

Mitchell vs. Tilghman, 19 Wall, 287.

If the language of the specification and claim show clearly what he desired to secure as a monopoly, nothing can be held as an infringement which does not fall within the terms the patentee has himself chosen to express his invention.

McClain vs. Otmayer, 141 U. S. 423.

In making his claim the inventor is at liberty to choose his own form of expression and while the courts may construe the same in view of the specification and the state of the art, they must not add to or detract from the claim.

Cimiotti Co. vs. American Co., 198 U. S. 399.
Dey Time Register Co. vs. Syracuse Co., 161
Fed. 284.
Schreiber et al. vs. Adams Co., 171 Fed. 830.
Westinghouse Co. vs. New York Co., 119 Fed.
874.

The courts should regard with jealousy and disfavor any attempt to enlarge the scope of a patent once granted, the effect of which would be to enable the patentee to appropriate other inventions made prior to such alterations.

Chicago et al. vs. Sayles, 97 U. S. 554.

The construction of a patent must be in conformity with the self imposed limitations which it contained in its claims.

New Departure Bell Co. vs. Bevin et al., 64
Fed. 859, 73 Fed. 469.

A patentee, who acquiesced in the rejection of a claim by the Patent Office, is estopped to claim the benefit of such claim, or such a construction of the claims allowed as would be equivalent thereto.

Credit Electrical Supply Co. vs. Westinghouse Electric Mfg. Co., 200 Fed. 144.

CONSTRUCTION OF CLAIMS IN SUIT.

We maintain under the restrictions placed on the invention of the patent in suit, that claim 1 of the re-issue patent in suit is limited:

1. To a fruit runway formed of a non-movable guide member and an opposing rotary member.

2. That the rotary member shall be composed of a series of longitudinally disposed end to end rollers.

3. That the non-movable guide member of the runway shall lie parallel with the plane which passes vertically and longitudinally through the center of the rollers forming the opposing member of the runway.

4. That the non-movable guide of the runway shall be grooved and a propelling rope be mounted in such groove of the non-movable guide for feeding the fruit through the runway, and means provided for moving the rope.

It is necessary that in the fruit runway called for by the above claim that the outer or movable member thereof be formed of a series of end to end rollers, due to the fact that it is required by the patent and the specification states, "that the ropes carry the fruit toward the lower end of the machine and at the same time the grade rollers are revolving, so as to keep the fruit from sticking in the runway." Unless the member opposing the non-movable guide be composed of positively driven rotary end to end disposed rollers, the fruit will stick in the runway, for the rollers must be disposed "end to end" to provide a substantially unbroken rotary outer wall surface for the travel of the fruit through the machine.

It is essential to the operativeness of appellant's machine that the non-movable guide be arranged in the specified plane called for by the claim, for by no other location thereof can the said guide constitute a parallel runway member for the opposing rotary member, so as to permit of the rope working in the groove of said non-movable guide to carry the fruit. Again, it must be so disposed, for the patent does not illustrate nor describe any other manner of locating the same relative to the parallel rotary member, and further for the reason that it was only by so claiming the position of the non-movable guide relative to the parallel series of end to end rollers of the rotary member of the runway and causing the rollers to form one member of the fruit runway that an allowance of the claim was secured.

That which induces an allowance of a claim is essential to the validity thereof and cannot be disregarded after the issuance of the letters patent in a suit for infringement.

Claim 10 of the reissue patent in suit requires:

1. That the fruit runway shall be composed of two parallel members.
2. That one of said members shall be composed of a "series of end to end rolls."
3. That bearing brackets shall be provided for the rolls.
4. Guides shall be provided for the brackets.
5. That means shall be provided for adjusting the brackets upon the guides.

This specific combination of co-operating elements must be employed and as specified in order to come

within the protection afforded by the said claim. You cannot disregard the "end to end" disposition of the rolls called for in the claim any more than you can the bearing brackets, the guides for the brackets nor the means for adjusting the brackets. If the series of rolls are not arranged "end to end" then the claim is not complied with, inasmuch as you do not in such case construct the runway of two parallel members "one of which is composed of a series of end to end rollers." As this disposition of the rolls was expressly brought into the claim to induce an allowance thereof, the same is just as essential to the claim as any other element expressed therein. Furthermore, you cannot produce a runway of two parallel members where one of the members comprises a series of rolls and obtain a substantially unbroken rotary wall surface for the runway, unless the rolls be placed "end to end." The placing of the rolls a distance apart would not produce such a runway, inasmuch as it would leave non-available grading spaces between the ends of adjacent rolls, just what the patentee sought to avoid and successfully accomplished by the "end to end" disposition of the rolls; besides, the Patent Office refused to grant a claim for the rolls arranged otherwise than "end to end" as specified in claim 10 of the reissue letters patent in suit.

The above is our construction of claims 1 and 10 of the reissue patent in suit gained from a reading of the letters patent and the disclosures of the file-wrapper proceedings which eventuated in the grant of the said letters patent, and this construction was given to the claim by his Honor Judge Wellborn on

careful consideration of the entire case after four days of argument. If we are correct in our conclusion there can be no infringement of the claims by the machine manufactured, sold and used by the appellees, inasmuch (as will be hereinafter shown) the said machine does not embody in its construction and mode of operation the combinations called for by said claims 1 and 10 of the reissue patent in suit. In fact, as stated by Judge Wellborn, the two are "different mechanically, are mechanically different."

So far we have construed claims 1 and 10 from the face of the reissue patent itself, in connection with the file-wrapper disclosure, in order to determine the exact construction to be placed on said claims and the scope thereof, under the assumption that the said claims are valid. However, we most earnestly contend not only that the appellees do not infringe the claims if valid and properly construed, but further that the claims are absolutely invalid by the prior art.

PRIOR ART.

As heretofore stated, the Strain reissue patent is designed for the grading of fruit, nuts and vegetables, its use not being intended to be confined to the grading of one class of fruit, viz.: oranges. In fact, the patentee states that as the grading rollers are adjustable relative to the non-movable guide "the distance between the roller and guide can be made small or large to adapt the machine to grading small nuts or fruit or large nuts or fruit," lines 92-95, p. 1 of the printed specification.

In anticipation of the claims in suit, the defendants

offered in evidence as exhibits, the following prior United States letters patent, the same appearing in the record between pp. 487-559, viz.:

399509 granted F. N. Ellithorpe, March 12, 1889, for improved Fruit Assorter.

No. 430031 granted J. A. Jones, June 10, 1890, for an improved Machine for Assorting or Sizing Fruit.

No. 442288 granted J. A. Jones, Dec. 9, 1890, for an improved Machine for Assorting and Sizing Fruits, etc.

No. 456092 granted H. H. Hutchins, July 14, 1891, for an improved Assorting Machine.

No. 458422 granted J. T. Ish, Aug. 25, 1891, for an improved Fruit Grading Machine.

No. 465856 granted H. H. Hutchins, Dec. 29, 1891, for an improved Fruit and Vegetable Assorter.

No. 466817 granted E. E. Woodward, Jany. 12, 1892, for an improved Orange Sizer.

No. 475497 granted G. A. & C. F. Fleming, May 24, 1892, for an improved Fruit Grader.

No. 482294 granted A. C. Burke, Sept. 6, 1892, for an improved Fruit Sizer.

No. 529032 granted H. C. Jones, Nov. 13, 1894, for an improved Fruit Sizer.

No. 534783 granted A. Cerruti, Feby. 26, 1895, for an improved Fruit Grader.

No. 538330 granted A. D. Huntley, Apr. 30, 1895, for an improved Orange Sizer.

No. 671646 granted R. G. Bailey, Apr. 9, 1901, for an improved Fruit Grader.

No. 673127 granted E. N. Maull, Apr. 30, 1901, for an improved Fruit Sorting Machine.

No. 713484 granted C. D. Nelson, Nov. 11, 1902, for an improved Fruit Assorting Table.

It will not be necessary to discuss each of the foregoing letters patent, inasmuch as the same have been sufficiently testified to by witness Cobb between pages 408 and 414 of the record. In the main, these prior letters patent were introduced to show that the machine of the patent in suit relates to mere improvements in a well filled field, and therefore not entitled to be given the consideration which is accorded under the patent law to a pioneer invention.

Many of the prior letters patent disclose fruit graders having a runway composed of a non-movable and a rotating member, with means for propelling the fruit to be graded through said runway and means for adjusting the rotary member of the runway to and from the fixed member thereof in order to vary the outlet aperture for the escape of the fruit. Certain of the prior letters patent illustrate machines having co-operating elements which comply with the terms of the claims in suit, for instance:

Letters Patent No. 456092—defendant's exhibit—Hutchins Patent “record page 505, granted H. H. Hutchins, July 14, 1891, for an improved Assorting Machine.” For convenience, we present a series of cuts disclosing more clearly the structural arrangement of the Hutchins machine. Like the machine of the patent in suit, it discloses a machine for the sorting or grading of “fruit and vegetables,” the same comprising a suitable frame, designated on the cut by the numeral A. Within the frame is arranged a fruit runway, the same consist-

Fig. 1

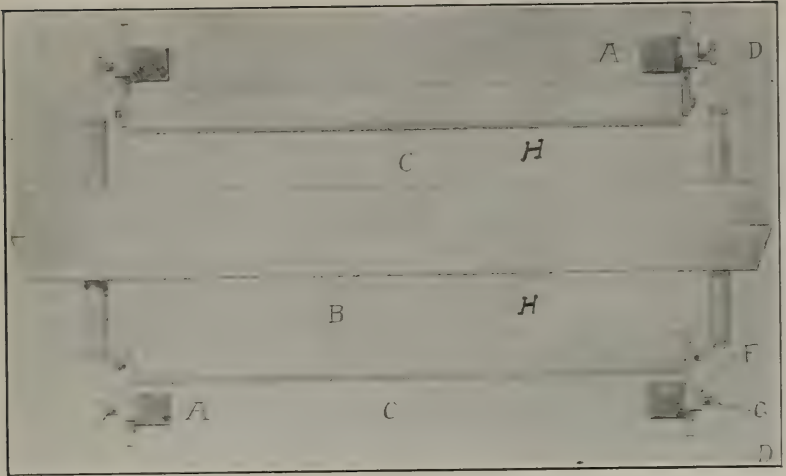


Fig. 2

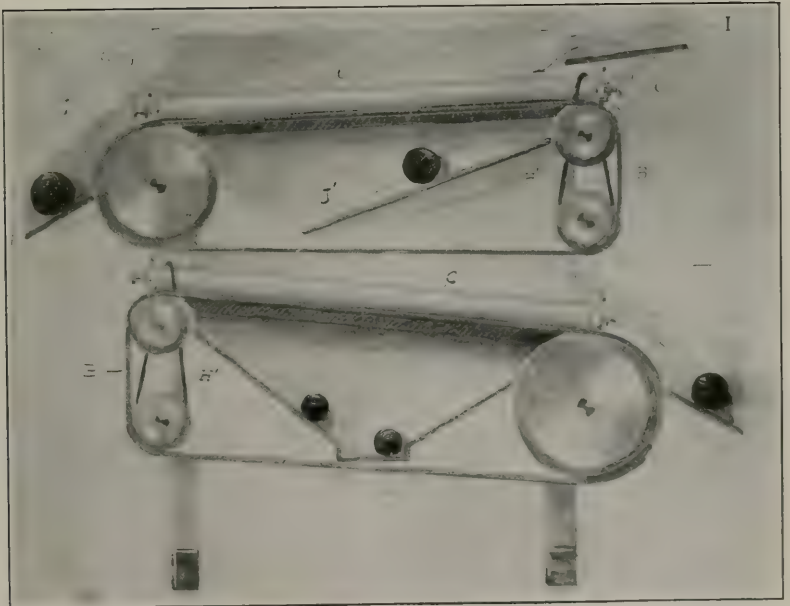
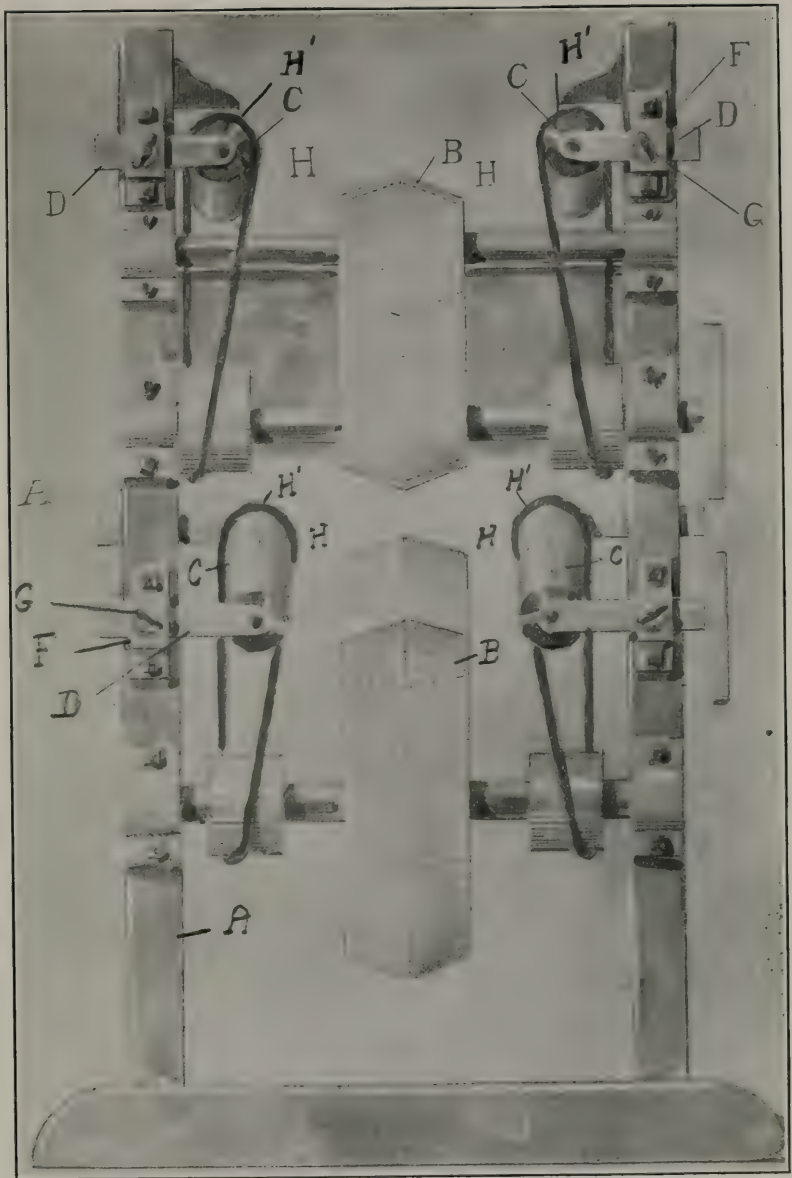


Fig. 3



ing of a non-movable guide which supports and over which works the belt B for conveying the fruit through the machine. This non-movable guide (designated in Fig. 3 of the drawings accompanying the letters patent by the reference numeral E), constitutes one member of the fruit runway, while the rotary member C constitutes the opposing member of the fruit runway. The rotary member is supported in bearing brackets D, which work in guides F, the said guides being adjusted within the bearing brackets by the adjusting means G. This adjustment permits of the rotary member being adjustable toward and from the non-movable guide member of the runway to vary the aperture or passage-way H for the fruit being graded within the machine, for the same purpose accomplished by the adjustability permitted the rotary rollers of the patent in suit. These rollers, like those of the patent in suit, are power driven by means of the drive belts or ropes H¹. In the Hutchins machine, which is a double grader like the grader of the patent in suit, the fruit runway is not a continuous longitudinally disposed runway, but for compactness of the machine, the runway is sub-divided into two vertically disposed sections, each section consisting of a non-movable member and an opposing adjustable rotary member. The entire fruit runway comprises a non-movable guide and a plurality of independent transversely adjustable rollers, and the non-movable guide member of the runway lies parallel with the plane which passes vertically and longitudinally through the center of the rotary member. Like the grader of the reissue patent in suit, the disposition of the transversely ad-

justable rotary member of the runway relative to non-movable guide member is such, that substantially the weight of the fruit being graded is taken care of by the rotary and non-movable member of the runway.

In operation, the fruit to be graded is delivered into the machine from the feed chute I, and enters at the upper end of the fruit runway. The fruit too large to pass through the discharge passageway of the runway as propelled there through by the belt or rope B discharges into the bin or receptacle J, while the fruit of a size sufficiently small to pass through the first grade space of the fruit runway enters onto the incline J¹, by which it is guided and deposited onto the second section of the fruit runway. Such fruit as is too large to pass through the discharge passageway of the fruit runway is conveyed there through by the belt or rope and discharged into the receptacle K for such sized fruit, while the smaller fruit of a size which will pass through the graded section of the runway is discharged into the receptacle L. By the Hutchins patent provision has been made for taking care of only three grades of fruit, but the number of grades is an immaterial feature. By increasing the length of the runway, an increased number of grades may be taken care of. The distinction between the Hutchins' patented grader and the grader of the patent in suit, is this, in the Strain grader all the grade spaces of the fruit runway for the fruit passing through the machine are formed by two parallel longitudinally disposed members, one being non-movable and the other rotary, whereas, in the Hutchins' grader, the said grade members of the

runway are vertically disposed. However, the said Hutchins' patent does disclose in a fruit grader the combination of a plurality of independent transversely adjustable rotating rollers, a non-movable guide lying parallel with a plane passing vertically and longitudinally through the center of the rollers, the rollers and guide forming a fruit runway, a propelling belt or rope supported by the said guide, and means to move said rope.

This is the combination called for by claim 1 of the reissue letters patent in suit, and it meets the terms of claim 10 of the said letters patent—if the limiting expression “end to end” disposition relative to the rollers is to be eliminated from the claim, as contended for by appellant; inasmuch as the patented machine discloses the combination—

In a fruit grading machine, a runway formed of two parallel members (the non-movable guide and the rotating member) the rotary member of said runway consisting of a series of rolls (C-C), brackets (D) carrying the rolls, guides (F) for the brackets, and means (G) for adjusting the brackets upon the guides.

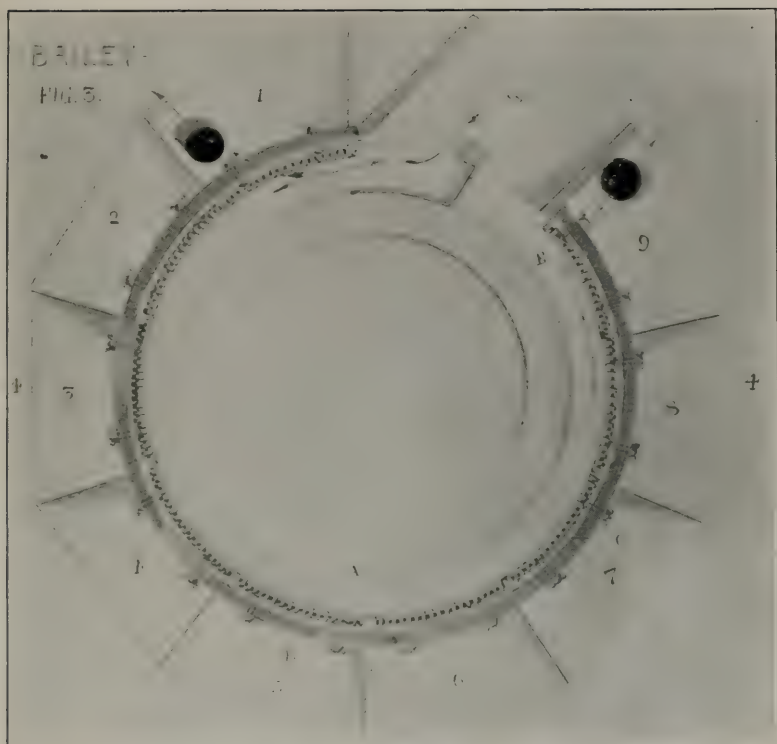
It will thus be seen that every element, and the identical combination called for by claim 10 (excepting “end to end” disposition of the rolls) is found in the Hutchins' machine, and used therein for the same purpose as called for by the patent in suit.

The “end to end” disposition of the grading rolls was not new with patentee Strain, for on reference to United States letters patent No. 671646, granted R. G. Bailey, April 9, 1901, for an improved Fruit Grader, such an arrangement of the grade rolls are

illustrated and described. It was admitted at the hearing in the lower court that these letters patent ante dated the filing date of the application of the Strain original letters patent, and no evidence was introduced to carry the Strain invention back of the date of the Bailey patent.

This patent (record page 544), like the Hutchins and other letters patent of the prior art, discloses a machine for the grading and sorting of fruit, and the same will be readily understood by the cuts appearing opposite hereto. The separate parts constituting the grading members are shown in detail by Figs. 1, 2 and 5, while in Fig. 3 a plan view of the assembled parts and by Fig. 4 a sectional view of the machine is illustrated.

In the Bailey machine, the fruit runway is a circular one, the same being composed of the rotatable guide member A, and the series of end to end rollers E. Instead of a single roller for each grade space, the roller is sub-divided into a plurality of small rollers E. The series of rollers E for each grade space are carried by a bracket C, and said brackets are supported by adjustable bearings. The purpose of the adjustment permitted the brackets C is to permit the rolls E to be moved toward and from the guide member A to increase or decrease the aperture for the escape of the fruit through the grade spaces. Each set of rollers E is independently adjustable toward and from the opposing member, so that the adjustment given to the rotatable wall surface of any given section of the fruit runway does not disturb the position of any of the other rotatable wall sections. The rotary member of the parallel members



-BAILEY-

FIG. 1.



FIG. 2.

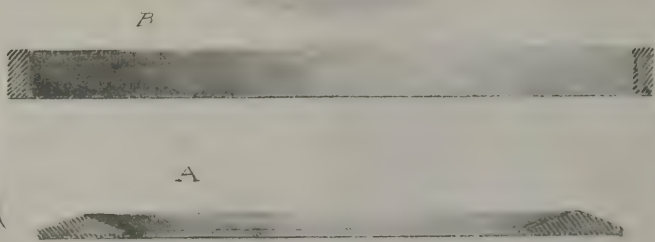
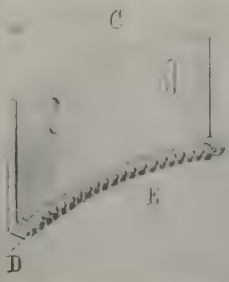


FIG. 5.



of the fruit runway is composed, as stated, of a plurality of independently adjustable rotary sections or grade units, these rotary sections or units being suspended in adjustable brackets from the circular non-movable plate B. Each independently adjustable rotary section controls a grade discharge opening for the fruit, the series of grade openings being numbered 1 to 9 in Fig. 3 of the cuts. The fruit to be graded is delivered into the machine from a suitable feed chute A¹ and is received onto the inclined surface of the rotating plate A, being carried around by the movement thereof. The fruit too large to escape through the grade outlet 1, is carried to the next outlet 2 and if too large for said outlet is advanced to outlet 3, and so on until an outlet of proper opening is found for the escape of the fruit.

The rollers E of the Bailey machine are arranged "end to end" so as to present a continuous rotary wall surface with which the fruit passing through the fruit runway co-acts until an outlet space in the runway of proper size is found for the escape of the fruit. Each rotary section, although composed of a plurality of individual units, constitutes a roller so far as relates to the grading feature for the fruit, and operates in the same manner as a rotary grade section composed of a single roller. These rotary sections of the Bailey fruit runway are independently adjustable toward and from the opposing member of the runway, and are adjustable for the same reason as the adjustment provided for the rotary sections of the Strain reissue patent in suit. Furthermore, the rotary sections of the runway of the Bailey machine are arranged "end to end" for the

same reason as the "end to end" disposition of the rotary sections of the Strain machine, to wit: to "form a continuous contact for the sides of the fruit" and to provide "a contact surface for the fruit which is freely movable, and which revolving in the opposite direction or upwardly prevents the fruit from being pinched when it arrives at spaces which are nearly large enough to allow it to pass, and it will thus be retained in the channel (fruit runway) until it arrives at a space which is sufficiently large for it to fall through."

Although the machine of the Bailey patent is of circular form, it nevertheless illustrates and describes a fruit grader having a fruit runway composed of two parallel members, one of said members comprising a series of "end to end" rollers, any one of the grade sections of the rotary member being adjustable toward and from the opposing member of the runway independent of the other sections of the rotary member.

Such being the case, each and every element of claim 10 of the reissue letters patent in suit is found in the Bailey machine, employed therein for the same purpose and working in the identical manner called for by said claim. In other words, the device of the Bailey patent is a fruit grading machine having "a runway formed of two parallel members, one of said members consisting of a series of end to end rolls (E), a bracket (C) carrying the rolls, guide (C¹) for the brackets, and means (B¹) for adjusting the brackets upon the guides."

If we are correct in our construction of the Bailey patent, and as to this we submit that the same is

(No Model.)

2 Sheets—Sheet 2.

J. T. ISH.
FRUIT GRADING MACHINE.

No. 458,422.

Patented Aug. 25, 1891.

Fig. 4.

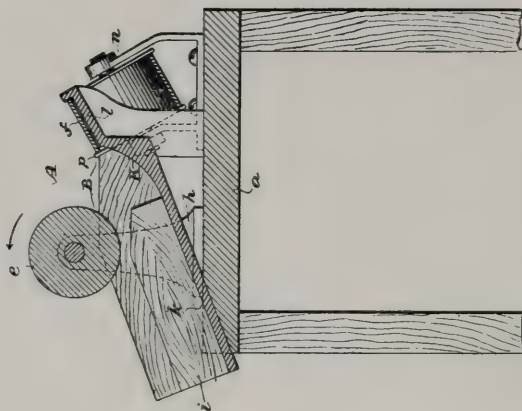
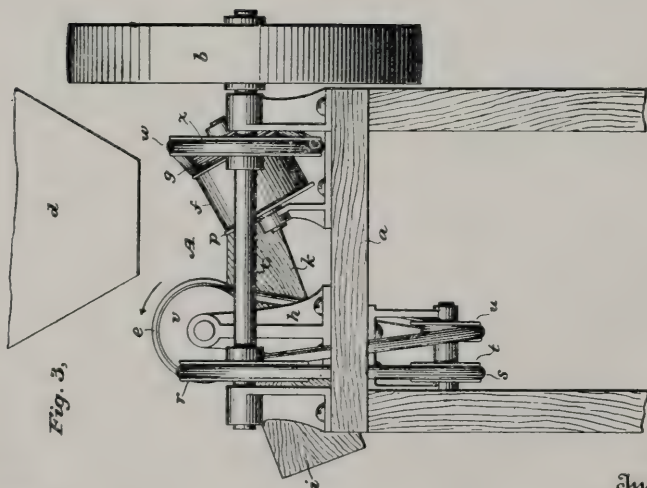


Fig. 3.



Witnesses
Geo. W. Brock
Edward Thorpe.

Inventor
James T. Ish.
By his Attorneys
Fowler & Fowler

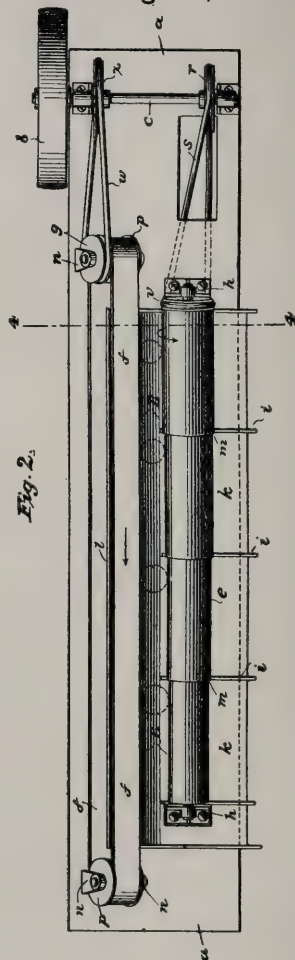
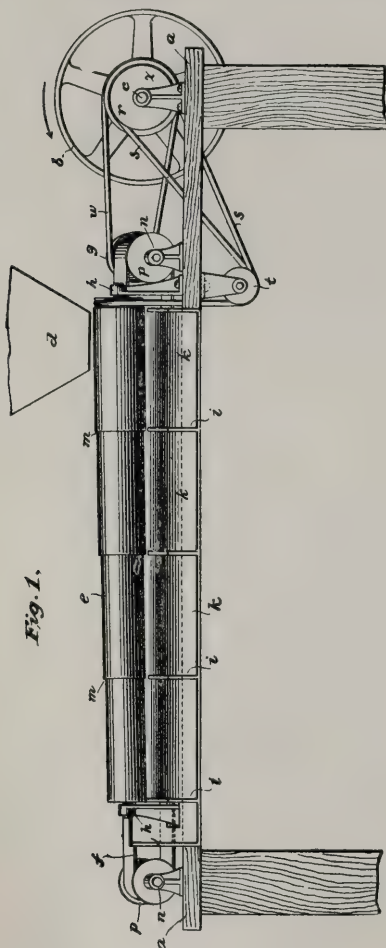
(No Model.)

2 Sheets—Sheet 1.

J. T. ISH.
FRUIT GRADING MACHINE.

No. 458,422.

Patented Aug. 25, 1891.



Witnesses
Geo. W. Bux.
Edward Thorpe:

Inventor
James T. Ish.
By his Attorneys
Foster & Foster

upheld by the testimony of appellant's expert witness Knight in answer to cross-questions 82 to 102, record pp. 708 to 712, then claim 10 of the reissue letters patent in suit is anticipated thereby, and the claim is invalid.

At this time, we wish to direct attention to United States letters patent No. 458422, granted J. T. Ish, August 25, 1891, for an improved Fruit Grading Machine.

These letters patent appear on p. 510 of the record, a cut illustrating the same appearing on the opposite page. This is one of the earliest forms of what is known as the "rope and roller" grader. As will be noted from the cut, the fruit runway is formed by a non-movable member *i* and a rotary member *e*, the fruit being conveyed through the fruit runway or "grading chute A" by means of "a flat belt" or "a rope" *f*. The disposition of the non-movable member is such that the edge of the belt or rope *f* "adjacent to the member *e* is in a plane parallel to the axis of said member." Means are provided for driving the conveyor belt or rope for the fruit, and the rotary member *e* of the runway is driven by suitable connection shown in the patent.

The application of the Ish patent was filed in the Patent Office June 21, 1889, although the letters patent for the invention disclosed thereby did not issue until August, 1891. This patent discloses perhaps the first form of a fruit grader having a graduated fruit runway formed of two parallel members, one of said members being non-movable and supporting an endless traveling propelling belt or rope for the fruit, and the other being a rotary member so

arranged as to provide independent graduated grade openings in the runway for the escape of the graded fruit. In the Ish machine (which according to the record herein was largely used in Southern California in connection with the grading of oranges) the rotary member of the runway is a stepped roller, each stepped section providing for a different size grade opening. In the patent drawing, the rotary member is formed with four step sections, permitting four sizes or grades of oranges to fall through the outlet aperture of the fruit runway. This patent is a pioneer one and contains a generic claim for a fruit separator "comprising a graduated rotary member and a traveling endless belt arranged parallel and adjacent thereto."

The Ish patent was owned by appellant Stebler—answer to X-Q. 99, record p. 651—and a great many of the machines were placed on the market—answer to X-Q. 110, record p. 652.

It will be noticed that the only difference between the Ish fruit grader and that of the patent in suit resides in the fact that in the Ish machine the rotating member of the fruit runway consists of a single roll stepped to produce grade sections, whereas in the Strain grader of the reissue patent instead of a stepped roll the roll is sub-divided into a plurality of short rolls, or, in other words, where the Ish patent discloses a four stepped roll as the rotary member of the runway, the Strain grader employs a short roll for each step of the single roll. Otherwise, the machines are the same—so far as concerns a fruit grader. Whether this amounts to invention is exceedingly questionable in view of the Bailey patent,

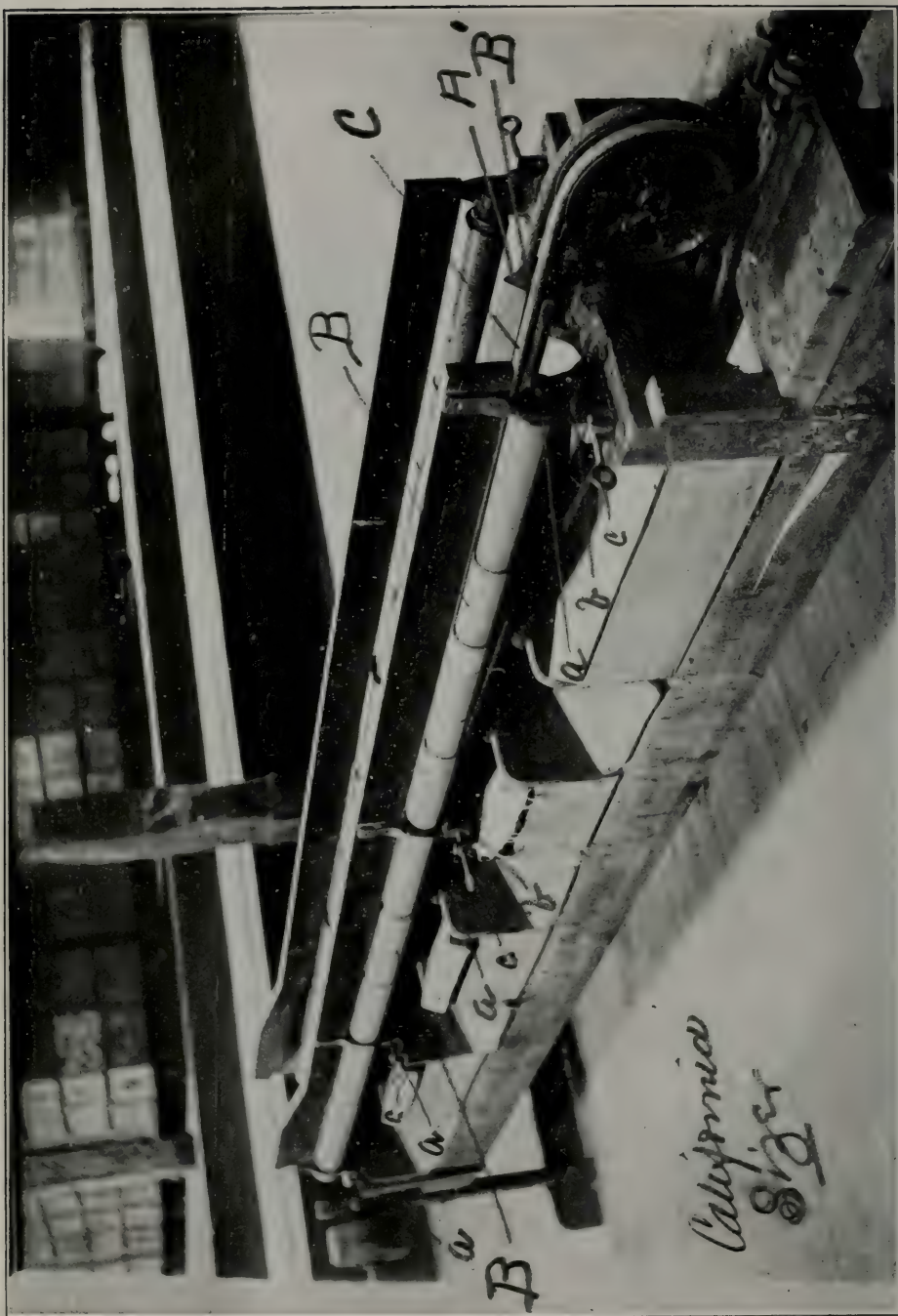
where the rotary member of the fruit runway is made up of a series of independently adjustable grade sections.

Patentee Bailey was the first to depart from the Ish invention by substituting for the single stepped roll member of the fruit runway a plurality of independently adjustable rotary sections as the rotary member of the runway. After this change, it certainly did not amount to invention to make each independently adjustable rotary grade section of a single short roll in place of an independently adjustable grade section consisting of a series of small rolls; more especially so where the independently adjustable end to end rotary sections perform the same function in each machine, as we have seen from the testimony of appellant's expert witness Knight. It is not invention to substitute for one well known device another well known device, where each perform the same function in the combination of co-operating elements of the machine. Thus, the substitution of an adjustable single small roller for each grade section of the fruit runway for the plurality of adjustable smaller rollers disclosed in the machine of the Bailey patent for each grade section of the fruit runway, does not amount to invention.

So long as the grading or sizing of oranges was carried out on a small scale, the Ish patented machine answered all the demands of the trade, in fact, as the record shows, such machine is in use in some of the smaller or individual packing houses today. However, as the orange industry increased it became necessary to secure greater bin capacity for the sized oranges.

It will be understood that with these sizing or fruit grading machines, the oranges flowing from the different gradeways of the machine are delivered into bins, and are taken from such bins by operators and packed into boxes. While the Ish machine as to sizing capacity supplied all the requirements demanded of a grader, it was limited as to bin capacity. To secure greater bin capacity it required that the grading machine be considerably increased in length over that of the Ish machine, which was approximately twelve feet long. To meet this demand, the first act of the manufacturer and users of the Ish machine (including the appellant herein) was to substitute for the single stepped roller of the Ish machine two stepped rollers, which rollers were placed end to end and formed the rotary parallel member of the fruit runway, the non-movable guide member being varied from that shown in the Ish patent to the extent of being grooved and having a propelling rope for the fruit placed in the groove of the said guide. By this change, the Ish machine was considerably lengthened to accommodate bins of increased capacity. In fact, the extension of the Ish machine was not confined to two "end to end" rollers, but three and four of such "end to end" rollers were utilized as the rotary member of the fruit runway, thereby producing a machine thirty feet or more in length. This machine (or rather the enlarged Ish machine), as placed on the market, was known as the "rope and roller sizer," and termed the "California Grader," and was largely manufactured and sold by the appellant herein, and is in use at the present time





California
Singer

in many of the larger fruit packing houses in Southern California.

A model of this California sizer was introduced in connection with defendant's testimony as "Defendants' Exhibit Model California Sizer," record page 323, and in connection with the introduction of said exhibit it was stipulated by counsel for appellant, that the same constituted a correct model of the old California sizer and that the California sizer was in use prior to the year 1900. A photographic print of one of the California sizers was introduced as "Defendants' Exhibit Upland Sizer," record page 225.

For convenience, we present herewith two cuts of the California sizer, the larger cut disclosing the machine with a plurality of end to end rollers, as installed for use in one of the packing houses. An examination of the smaller cut discloses a fruit grading machine, the runway of which is composed of two parallel members, one member consisting of a non-movable grooved guide A, the other of a plurality of independently adjustable rollers B. The non-movable groove guide member lies parallel "with a plane which passes vertically and longitudinally through the center of the said rollers." A rope C for propelling the fruit through the runway work within the groove B¹ of the non-movable member of the runway, and means are provided as illustrated for driving the said rope. From the drive mechanism for the rope C power is transmitted for imparting rotation to the series of rollers. The rollers B are arranged "end to end" and the said rollers with the non-movable grooved guide A constitute the parallel

members forming the fruit runway of the grader. The "end to end" rollers B are carried by brackets *a*, which brackets in turn work in guide *b*, and the means *c* adjust the brackets upon the guides. The larger cut illustrates a greater number of end to end rollers than are disclosed in the smaller cut.

This California sizer contains each every element of the combinations called for by claims 1 and 10 of the reissue letters patent in suit, and, in fact, such a constructed machine falls within the protection afforded by said claims. The manufacture, use and sale of the California sizer at this time would constitute an infringement of the involved claims 1 and 10, if the same are valid. Such being the case, the claims are void, for, it is well established, "that what would infringes, if later, anticipates, if earlier."

Peters vs. Active Mfg. Co., 21 Fed 319.

A comparison of the California sizer with the fruit grader of the patent in suit, discloses that each comprises the same working elements, arranged in the same manner, each element performing in one machine the corresponding work accomplished in the other, each machine being designed for the sizing of the same class of fruit, and each manufactured and sold for use in connection with packing houses.

The California sizer was placed into use at least as early as 1896 and has continued in use ever since. It was a successful machine and handled all fruit delivered thereto for sizing purposes.

These facts are amply proven by the testimony of witness L. E. Tucker (record p. 220), foreman of the Upland Citrus Association; T. C. Jameson (record

p. 240), foreman of the Jameson Packing House; F. K. Adams (record p. 252), manager of the West Ontario Citrus Association; F. E. Procead (record p. 264), formerly foreman of the Parker Packing House; H. E. Wolcott (record p. 284), manager of The Pomona Fruit Growers' Exchange, and of George D. Parker (record p. 315), one of the appellees herein.

Each of the above witnesses testify as to the use and operation of the California sizer, but, in view of the stipulation of appellant's counsel regarding the prior use of the machine, it is needless to quote the testimony of the witnesses relative thereto.

While from an examination of the model exhibit of the California sizer, it is evident that the rolls comprising the rotary member of the runway are arranged "end to end" and supported by adjustable brackets, as called for by claim 10 of the reissue letters patent in suit and as testified to by the mentioned witnesses, the same is testified to by witness Cobb, in following answer to questions 47, 48, 49, 50 and 51, record pp. 423-425:

"Claim 10 of the patent in suit reads: 'In a fruit grading machine, a runway formed of two parallel members, one of said members consisting of a series of end to end rolls, brackets carrying the rolls, guides for the brackets and means for adjusting the bracket upon the guide, substantially as set forth.' In the model I find a fruit-grading machine having a runway formed of two parallel members, one of said members consisting of a series of end to end rolls. I find brackets carrying the rolls, guides for the brackets and means for adjusting the brackets upon

the guides as set forth in claim 10 of the patent in suit.

“Q. 48 (By MR. ACHER). How does the end to end arrangement of the rollers of the model exhibit conform to the end to end arrangement of the rollers of the machine disclosed by the patent in suit?

“A. In the model the rolls placed end to end, considering two consecutive rolls in the series, are supported by a bracket which acts as a common support of one end of each roll adjacent thereto. The connection between one roll and its adjacent roll is not so rigid as to prevent slight adjustment. In the patent in suit the arrangement of the rolls and their supports are such that either end of either roll forming the series of end to end rolls may be independently adjusted without affecting either end of any of the remaining rolls.

“Q. 49. My question was, Mr. Cobb, how did the end to end arrangement of the rolls of the model compare with the end to end arrangement of the rollers of the grading member of the machine set forth in the patent in suit?

“A. So far as forming a runway is concerned, they are practically the same. They are arranged as close together as mechanical construction will allow, so that there is in use a continuous runway for fruit, and no space allowed for fruit of improper size brought through at an improper place.

“Q. 50. You have described to me the construction of the model, and my question is, how does that compare with the arrangement of the end to end rolls of the machine disclosed by the patent in suit?

“A. It has all the parts shown here that are shown there, and virtually in the same position

relative to one another, and operating substantially in the same manner.

“Q. 51. In the same manner as what?

“A. As shown by and accomplished by the parallel members of the runway in the patent in suit.”

This testimony is upheld by appellant's expert witness Knight, in answer to X-Q. 44 to 49, relative to a photograph illustrating such machine, record pp. 132-133.

The rollers of the California machine are transversely adjustable toward and from the non-movable grooved guide, the guide lies parallel with the plane which passes vertically and longitudinally through the center of the rollers, the rollers are independently adjustable, and they are mounted as called for by the patent in suit. The propelling rope for the fruit works within the groove of the non-movable guide.

The said California sizer not only anticipates claim 10 of the reissue letters patent in suit, but equally so claim 1 thereof.

We submit that all that was done by patentee Strain was to substitute one short roller for the series of small rollers of the Bailey patent for each individually adjustable grade section, or to substitute a plurality of short rollers for the plurality of long “end to end” rollers of the California grader. Such substitution of well known equivalent produced no new function in the working of the machine, and such substitution did not amount to invention.

The substitution of equivalents is not invention.

Smith vs. Nichols, 21 Wall. 112.

Atlantic Works vs. Brady, 107 U. S. 192.

Hollister vs. Mfg. Co., 113 U. S. 59.

Aron vs. Railway Co., 132 U. S. 85.

Trimmer Co. vs. Slivers, 137 U. S. 425.

Manufacturing Co. vs. Cary, 147 U. S. 625.

From the above, taken in connection with the other prior patents introduced in evidence, it will be observed that if anything remains in the patent in suit on which to base a claim for invention, it must reside in the specific detailed arrangement of the working parts for its differentiation from the prior art. The claims to be held valid, must be held restricted to every limitation appearing therein, and no departure therefrom can be permitted. The patent does not fall within the recognized definition of a pioneer invention. The Supreme Court states in connection with the word "pioneer": "This word, although used somewhat loosely, is commonly understood to denote a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection in what had gone before. Most conspicuous examples of such patents are: the one to Howe of the sewing machine; to Morse of the electric telegraph; and to Bell of the telephone."

Westinghouse vs. Boyden Power Brake Co.,
170 U. S. 537.

If anything of an inventive character remained to Strain, patentee of the reissue letters patent in suit,

at the time he entered the field of fruit graders as an inventor, the law applicable to the construction of the letters patent granted him and to the determination of infringing identity based upon that construction is to be found in the following cases in the Supreme Court:

Cimiotti Unhairing Co. vs. American Fur Refining Company, 25 Supreme Ct. Reporter, 697.

Singer Mfg. Co. vs. Cramer, 192 U. S. 265.

Kokomo Fence Machine Co. vs. Kitselman, 189 U. S. 8.

Westinghouse vs. Boyden Power Brake Co., 170 U. S. 537.

Boyd vs. Janesville Hay Tool Co., 158 U. S. 260.

Also in the following cases in the Courts of Appeal and the Circuit Courts:

Brown vs. Huntington Piano Co., 134 Fed. 735.

Rich vs. Baldwin, Tuthill & Bolton, 133 Fed. 920.

Julius King Optical Co. vs. Bilhoefer, 127 Fed. 127.

Overweight Counterbalance Elevator Co. vs. Improved Order Red Men's Hall, 94 Fed. 155.

Griffith vs. Shaw, 89 Fed. 313.

Taber Bas-Relief Co. vs. Marceau, 87 Fed. 871.

Boyden Power-Brake Co. vs. Westinghouse

Air Brake Co., 70 Fed. 816.

Ransome vs. Hyatt, 69 Fed. 148.

Ney vs. Ney Mfg. Co., 69 Fed. 405.

In considering the claim of invention for the machine of the letters patent in suit and the combinations called for by claims 1 and 10 thereof, it must be borne in mind that the Patent Office had no knowledge of the prior use of the California sizer nor the testimony relative thereto. We have no hesitation in asserting that had this machine been before the Patent Office, the claims herein sued on would never have been allowed.

Before passing to a consideration of the appellees' machine, we wish to give slight attention to the claim made in the lower court that the machine of the re-issue letters patent in suit supplanted all other fruit graders. This is not a fact. More correctly stated, it is a case of suppression and not supplanting. The record herein discloses that the manufacture of such machines of the rope and roller type as were placed on the market prior to the issuance of the Strain letters patent were stopped by suits brought by Fred Stebler (appellant herein) for infringement of the Ish letters patent owned by his company. After securing the Strain patent in suit, Fred Stebler, according to the record, virtually discontinued the manufacture of the California sizer, protected under the generic claims of the Ish patent, and proceeded to place on the market the Strain sizer. Under these circumstances, the Strain machine cannot be said to have supplanted other machines. It is a case where the appellant herein controlled the market, and it is

this control which he seeks to maintain at the present time.

However, where there is no patentable novelty, utility or extended use is of no importance in considering the question of inventions.

In the case of *Voightmann vs. Weis & Ridge Cornice Co.*, 133 F. R. 298, 304, the Court said:

“No extent of use can supply the want of actual invention or cure the vice of mere aggregation. *Adams vs. Bellaire Stamping Company*, 141 U. S. 539, 12 Sup. Ct. 66, 35 L. Ed. 849; *Lehigh Valley R. Co. vs. Kearney*, 158 U. S. 461, 15 Sup. Ct. 871, 39 L. Ed. 1055; *Olin vs. Timken*, 155 U. S. 141, 15 Sup. Ct. 49, 39 L. Ed. 100; *Grant vs. Walter*, 148 U. S. 547, 13 Sup. Ct. 699, 37 L. Ed. 552. This is well summed up by Mr. Justice Brown in *McClain vs. Ortmayer*, 141 U. S. 420, 12 Sup. Ct. 79, 35 L. Ed. 800.”

In *Hotel Security Checking Co. vs. Lorraine Co.*, 155 F. R. 298, the Court said:

“In view of the foregoing, the asserted extensive use into which the device has gone and the large amounts in royalties that have been paid to complainant cannot be considered as giving the device patentable novelty. Upon this point the adjudications uniformly hold that, where there is no invention, the extent of the sales and use of the patented article is immaterial. *McClain vs. Ortmayer*, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; *Adams vs. Bellaire Stamping Co.*, 141 U. S. 539, 12 Sup. Ct. 66, 35 L. Ed. 849; *Peoria Target Co. vs. Cleveland Target Co. (C. C.)*, 47 Fed. 725; *Olin vs. Timken*, 155 U. S. 155, 15 Sup. Ct. 49, 39 L. Ed. 100.”

In the case of *Tubelt Co. vs. Friedman*, 158 F. R. 430, 439, the Court said:

“Its greater utility, durability, attractiveness, and marketability do not of themselves show patentable novelty. These facts are evidence on the subject, and in very doubtful cases may be persuasive and turn the scale in favor of the patentability of the device. A valid patent must combine utility, novelty and invention. Neither large sales nor popularity nor effectiveness of itself shows patentable invention. Nor do all these combined establish it. See *Duer vs. Corbin Co.*, 149 U. S. 216, 223, 13 Sup. Ct. 850, 37 L. Ed. 707; *Richards vs. Elevator Co.*, 159 U. S. 477, 487, 16 Sup. Ct. 53, 40 L. Ed. 225; *American Sales Book Co. vs. Bullivant*, 117 Fed. 255, 54 C. C. A. 287; *McClain vs. Ortmyer*, 141 U. S. 419, 429, 12 Sup. Ct. 76, 35 L. Ed. 800; *Union Biscuit Co. vs. Peters*, 125 Fed. 601, 609, 60 C. C. A. 337; *Falk Mfg. Co. vs. Missouri R. Co.*, 103 Fed. 295, 43 C. C. A. 240; *New Departure Bell Co. vs. Bevin Bros. Mfg. Co.*, 73 Fed. 469, 19 C. C. A. 534; *Dodge Coal Storage Co. vs. N. Y. C. & H. R. R. Co.*, 150 Fed. 738, 80 C. C. A. 404.”

In the case of *McClain vs. Ortmyer*, 141 U. S. 419, the Court said:

“That the extent to which a patented device has gone into use is an unsafe criterion even of its actual utility, is evident from the fact that the general introduction of manufactured articles is as often effected by extensive and judicious advertising, activity in putting the goods upon the market, and large commissions to dealers, as by the intrinsic merit of the articles themselves.
* * * While this Court has held in a number of cases, even so late as *Magowan vs. New York Belt. & Pack. Co.*, 141 U. S. 332, decided at the present term, that in a doubtful case the fact that a patented article had gone into general use is evidence of its utility, it is not conclusive even of that—much less of its patentable novelty.”

The same rule is applied in *Lovell Mfg. Co. vs. Cary*, 147 U. S. 623.

In the case of *Adams vs. Bellaire Stamping Co.*, 141 U. S. 539, the Court said:

“Nor under the circumstances did the Court err in declining to instruct the jury, that the fact that the Irwin lantern had practically superseded all others was strong evidence of its novelty. The question before the Court upon the main issue was not of the novelty of the invention, but rather of its patentable character. Where there is no invention the extent of the use is not a matter of moment.”

In the case of *Olin vs. Timken*, 155 U. S. 141, 155, the Court said:

“And while the patented article may have been popular and met with large sales, that fact is not important when the alleged invention is without patentable novelty. *Duer vs. Corbin Cabinet Lock Co.*, 149 U. S. 216.

ALLEGED INFRINGING MACHINE.

The claimed infringing machine is the output of the Parker Machine Works, a company located and doing business at Riverside, Southern District of California. The said works is engaged in the manufacture and sale of packing house machinery generally, fruit grading or sizing machines being one of its outputs. The owner of the works is George D. Parker, one of the appellees herein, and the other appellee is a user of the grading machine purchased from the Parker Machine Works. The grading machine placed on the market by the Parker Machine

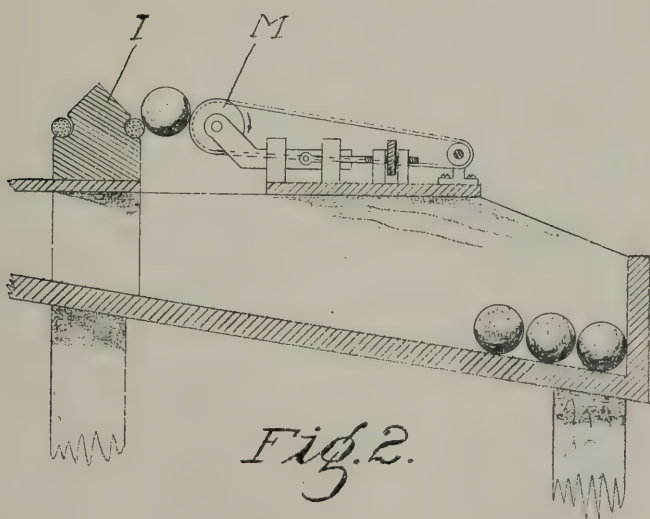
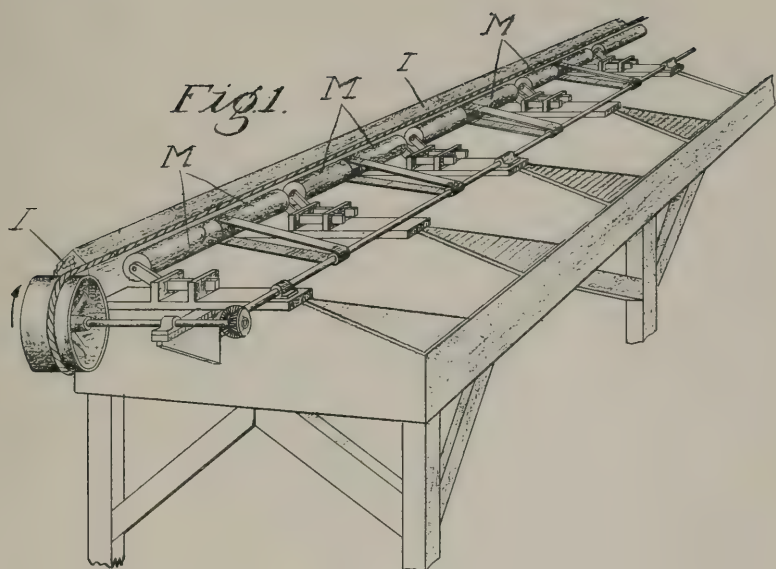
Works and claimed to be an infringement of claims 1 and 10 of the reissue patent in suit, is protected by United States letters patent No. 997468, issued to George D. Parker, July 11, 1911, for an improved Fruit Sizer or Grader, the said letters patent appearing on p. 784 of the record.

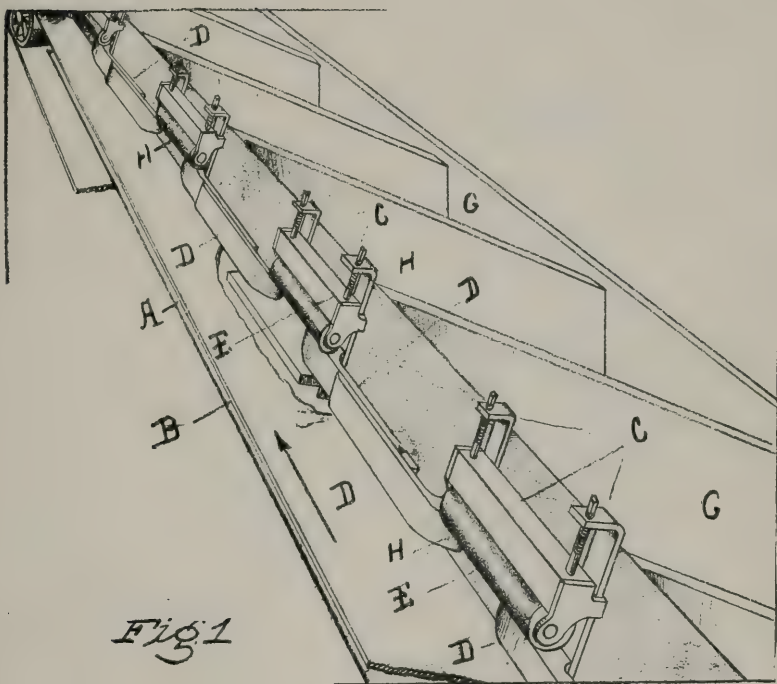
The presumption arising from the grant of a subsequent patent to the defendant is that there was a substantial difference between inventions.

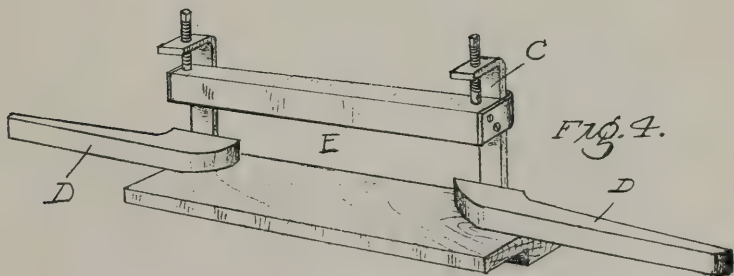
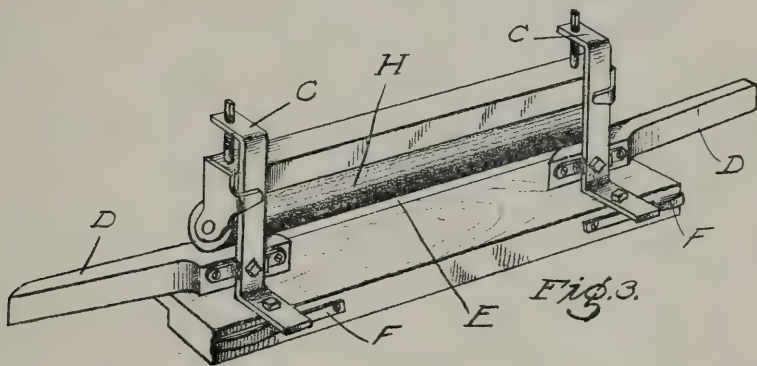
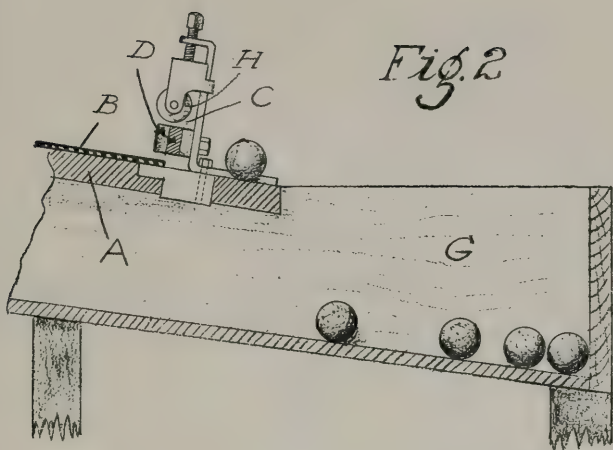
For comparison we present a cut of appellant's machine and a cut of appellees' machine, Figs. 1 and 2 representing appellant's machine and Figs. 1, 2, 3, and 4 appellees' machine.

As heretofore pointed out and as will be noted by reference to Fig. 1 of the cut, the inner member of the runway of appellant's machine is the non-movable grooved guide I, and the outer rotary member of the runway consists of a series of "end to end" rollers M. The non-movable guide member lies parallel with the plane which passes vertically and longitudinally through the center of the rollers, and the said guide and rollers constitute the parallel members of the fruit runway for the grader.

Comparing appellees' machine with appellant's machine, it will be noted that the fruit runway is composed of two non-rotary members, of which the inner member A constitutes the outer inclined surface of the table of the machine and serves as a support for the propelling belt B, which conveys the fruit through the runway. The outer non-rotary member is composed of a series of longitudinally movable open frames C, each being provided with laterally extended arms D. The opening E of each







frame constitutes the discharge outlet for the fruit, there being a frame C for each size of fruit to be graded. These frames are adjustably attached to the outer edge of the inclined table A, by clamping means F.

It is these open frames C with the overlapping arms D which constitute the non-rotary outer member of the fruit runway for the fruit, and it requires but a casual glance to convince anyone that this arrangement of longitudinally adjustable frames C does not provide a rotary member of a fruit runway consisting of a series of rotary "end to end" rollers. In the operation of appellees' machine, the fruit passing over the support or inclined surface of the table A, being conveyed thereover by the belt B, as it reaches an outlet opening E of proper size in any one of the series of open frames C, the fruit escapes there through and flows into the fruit bin G, controlled by such frame. To adapt the machine for fruit of varying kinds, it is preferable that the outlet opening E of each frame C be controlled to vary the opening thereof vertically. Preferably, for this purpose there is adjustably mounted in each frame a roll H, which may be adjusted vertically to vary the height of the opening D in order that the outlet of each frame C may be regulated for the fruit to be sized. While the roll H serves to adjust the opening C, its main function is to provide a cushioned surface against which the fruit impinges as it escapes through any one of the frames C, the elasticity provided for by said roll preventing the fruit being injured, which would be liable to occur if the fruit was forced against the edge of a metallic adjustable bar

or non-elastic plate. Of course, an adjustable canvas flap would answer the same purpose, but preferably an adjustable roller is employed for this purpose, just as is utilized in connection with the machine of the Bailey patent. In appellees' machine the outer wall of the fruit runway is a non-rotatable member composed of a series of aligned open frames C, gradation for such open frames being provided for by the adjustable cushion rolls H, situated within each of the openings of the frames C.

At best, it can only be said of appellees' machine that it has a fruit runway provided with graduated outlets for the fruit to be sized, but such is in common with every fruit runway of the machines of the prior art. This feature of a runway is not new in appellant's machine and no novelty can be claimed therefor, and, as a matter of fact, this is the only feature in common between the appellant's and appellees' machine.

The cushion rolls H of the appellees' machine are not designed for the purpose of providing a rotary parallel member for a fruit runway consisting of a series of end to end rolls, for, as a matter of fact, the said rolls are separated and located a long distance apart. Again, the said rolls are not arranged so that they, in combination with a non-movable grooved guide member lying parallel with a plane which passes vertically and longitudinally through the center of the rolls, shall constitute a fruit runway, as called for by claim 1 of the patent in suit. In fact, no such non-movable grooved guide is found in appellees' machine, unless the inclined portion of the table A be treated as such. Even then, the in-

clined supporting surface of said table does not lie parallel with a plane which passes vertically and longitudinally through the center of rollers which form the opposing member of a fruit runway.

It will thus be seen that the Parker patented machine is not a fruit grader having a plurality of independently transversely adjustable rotating rollers as one member of a fruit runway, element of claim 1 of the patent in suit.

It has not "a non-movable groove guide lying parallel with the plane which passes vertically and longitudinally through the center of rollers forming an outer member of a fruit runway," element 2 of the claim.

Its fruit runway is not formed of such a series of independently transversely adjustable rollers and a non-movable grooved guide, element 3 of the claim, and it has not such a constructed runway provided with a propelling rope working in the groove of the non-movable grooved guide.

Thus every combined element of claim 1 of the patent in suit is lacking in appellees' machine.

Appellees' machine does not fall within the terms of claim 10 of the reissue letters patent in suit, inasmuch as there is lacking in said machine the features which induced an allowance of the claim, viz.: "a runway formed of two parallel members, one of said members consisting of a series of *end to end* rolls," and equally so it lacks the detailed bearing brackets for the rolls and the adjusting means for the brackets called for by the claim.

Appellant contends that the expression "end to end" positioning of the rolls does not mean that they

shall be arranged actually *end to end*, but that by such expression is meant an end toward end disposition of the rollers, so that if the rollers are situated eighteen inches, two feet, or more apart, such an arrangement is covered by the claim.

In answer to this proposition we assert—

1. That it is essential under the disclosure of appellant's patent in suit that the rotary parallel member of the runway be composed of rollers placed "end to end," and not end toward end, in order to produce a substantially unbroken rotary wall surface.

2. That no other form of constructed rotary member is disclosed by the patent in suit.

3. That any other arrangement of the rolls forming the rotary member of the fruit runway would produce an inoperative machine for the successful sizing of the fruit.

4. That to expand the expression "end to end" into "end toward end" is to give to appellant that which the patentee did not invent and so enlarges the claim as to embrace the prior art.

5. That it was only by so limiting the construction of the rotary member to a series of "end to end" rollers, together with the detailed supporting and adjusting means for the rollers that the patentee induced an allowance of the claim.

We assert without hesitation that neither claim of the reissue patent in suit is infringed by appellees' machine.

In the lower court it was argued, with some degree of seriousness, that the overlapping extended arms of the open grade frames of the Parker patented

machine was the equivalent of appellant's construction with certain rolls of the rotary member blocked out or rather put out of commission, it being stated that in place of such roll a filler stick may be employed for guiding the fruit from one roll of the rotary member of the fruit runway to the successive roll, and such construction is the equivalent of the guide arm employed by the appellees for permitting the fruit to pass through the fruit runway of the machine.

We are frank to state that such an arrangement is not understood, and, furthermore, that no such arrangement can be employed and the integrity of the grader maintained. However, no such disclosure is given by the specification and drawings of the patent in suit. Such a contention is absurd, and we seriously question the sincerity of appellant in advancing the same.

The absurdity of the statement will be appreciated when it is understood that each independently adjustable roll of appellant's machine and each open frame of the appellees' machine stands for one grade of fruit, and in the patent in suit we are told that there is provided a grade roller for each grade of fruit and that in "*orange grading there are usually nine grades.*" If the machine is provided with nine independently adjustable grade rollers, as called for by the patent in suit for the grading of oranges, and you cut out one of the series of end to end rollers by the employment of a filled stick or other means to block out one or more of such rollers, you then destroy the usefulness of such roller and lose the grade of fruit which such roller is to take care of. If two

rollers are cut out, then two grades of the fruit is lost, so for each roller cut out. The machine when so mutilated will not operate to successfully grade oranges, and any such mutilated machine would not be given consideration to by any packing house in connection with the sizing or grading of oranges, for it would defeat the very purpose for which graders of this class are designed. Furthermore, appellant Stebler, manufacturer of the fruit grader of the patent in suit, never placed a machine on the market equipped with filler sticks nor ever explained to a purchaser of such machines how the same could be employed. In support of this statement, attention is directed to the testimony of appellant Stebler in answer to R. C. Q. 7, record p. 114 to X. Q. 63 to 98, record pp. 647-650, also answer to X. Q. 180, p. 660.

Appellees' machine is entirely different from appellant's machine, and performs a function never contemplated by patentee Strain and which cannot be carried out by a machine constructed under the reissue patent in suit. In appellees' machine the outer member of the fruit runway is composed of a series of *longitudinally adjustable non-rotary units*, each unit having an outlet opening for the fruit and in each outlet opening there is mounted a vertically adjustable elastic cushion. The purpose of the longitudinal adjustment provided for the non-rotatable units of the said machine, is to permit the fruit bins to be adjustable in order that the capacity thereof may be varied to accommodate them to the different runs of the fruit as to size. Where the bins are adjustable, it is required that the grade unit be adjusted longitudinally in order that the graded or

sized fruit may be delivered as nearly as possible to the center of the bin. This is best explained by the following testimony of witness Parker in answer to Q. 69 to 78, record pp. 333-335:

“Q. 69. How does the end to end arrangement of rollers in the California sizer model conform to the end to end arrangement as disclosed by the letters patent in suit? A. They are identical.

“Q. 70. How does the operation of the co-acting parts in the Parker machine, as illustrated by the model exhibit, compare with the operation of the working parts of the sizer of the patent in suit?

“A. They are entirely different, and are adjustable longitudinally of the sizer, each roller being a distinct sizer, independent of all the others, the sizer or opening for the fruit conforming to the sizes on the run of the fruit. The sizing portions may be any distance apart longitudinally of the sizer. In the Strain or Stebler sizer the rollers abut or form a continuous roll from end to end.

“Q. 71. What purpose is accomplished by the longitudinal adjustment permitted in the Parker machine of the sizing units?

“A. In sizing for fruit at different seasons of the year, they run to an excess of one size, making it necessary that the bins be adjustable where the fruit may run a large proportion of one size. Of late years it has been necessary to have what they style an adjustable bin. In the Parker sizer we adjust our sizing member longitudinally to conform with the run of the fruit, and the run of the fruit determining the size of the bins holding the same. This makes a very flexible, if one might use that term, adjust-

able of the bins, allowing a large variation in the size of the same. In this machine, constructed as it is, we get about fifty per cent more bin-room in relation to the floor space occupied than is gotten by the Strain or Stebler sizer of the present style as manufactured and installed. The adjustable bin feature is the principal reason for any changes in the equipment of the ordinary house as equipped for packing fruit. The outputs of the same increasing from year to year, and as installed by the Strain sizer made in lengths up to 40 feet, there was no provision made for the adjustment of bins, it not being practical to make the sizers longer, and the packing-house people were calling to some extent for some of the advantages of the overhead or elevated California sizers, in which the fruit was allowed to roll down inclined chutes or roll-ways, and could be switched from one portion of the bins to another. In this switching or adjustable bin feature, it allows more packers to pack in a given floor space, and by making the bins larger, to hold any particular fruit, which may be running to an excess, it allows more packers to pack from that particular size of fruit.

“Q. 72. What is the purpose of the rolls or rollers appearing in connection with the grading units of the Parker device as disclosed by the model exhibit?

“A. They are buffers or cushions which relieve the tension or binding of the fruit as it is being sized.

“Q. 73. Are you familiar with the construction and operation of the Stebler sizer as utilized in the packing-houses, and by the Stebler sizer, I mean the sizer conforming to the sizer in the letters patent in suit? A. Yes.

“Q. 74. What provision, if any, is made in the

Stebler sizer to vary the run of fruit to any given bin or to permit of the adaptability or adjustment of the bin to the run of various sizes of fruit?

“A. There is none.

“Q. 75. Have you read the testimony given by Fred Stebler in connection with the present suit?

“A. Yes sir.

“Q. 76. What have you to state regarding the use of filler-sticks referred to by Mr. Stebler in his testimony?

“A. We do not see how the same could be used, and the sizer utilized in its entirety.

“Q. 77. What do you mean by ‘not utilized in its entirety’?

“A. If we use a filler-stick we lose that grading space.

“Q. 78. Do you know of any instance where filler-sticks have been employed in connection with the Strain sizer?

“A. I do not.”

Appellees' machine is protected by the grant of letters patent covering the invention disclosed thereby, and the patented machine is directed toward adapting the grading units to the adjustability of the fruit bins, apparently a new feature in connection with fruit graders. While it is true that appellant has a patent, it is respectfully submitted that the validity thereof is seriously questioned in view of the prior art as disclosed by the patent record and more particularly by the prior art and public use as disclosed by the California Grader, which was unknown to the Patent Office. If any invention re-

sides in the machine of the letters patent in suit, it seemingly is microscopic. Anyway, it is not a pioneer invention, and the substance of the invention (if any) is not found in appellees' machine.

The case of Kokomo Fence Machine Co. vs. Kitselman, 189 U. S. 8, is very applicable to the case at bar, in that in addition to the statement of the rule of claim construction of patents which are not "pioneers" it limits that construction still more closely where the defendant has a patent, and plaintiff and defendant are contending as to infringement "on an equal field," and by reason of the presumption which arises from the grant of the defendant's patent. The Court says that under the circumstances of that case, the claims must be limited in their scope to the *actual* combination of essential parts shown, and cannot be construed to cover other combinations of elements of *different construction and arrangement*.

The opinion was rendered by Mr. Chief Justice Fuller. The history of the case below is first briefly stated. The Circuit Court was of the opinion that none of the complainants' patents was a pioneer invention, but that all were merely improvements on the prior art, and to be construed in that light. "In its judgment, complainants and defendants contended as to infringement on an equal field, the presumption of the validity of the complainants' patents being met by the presumption of the validity of the patent to Whitney," referring to the defendants' patent.

The Circuit Court thereupon found that there was no infringement and dismissed the bill.

The case was taken then to the Circuit Court of Appeals, which Court "concurrent with the Circuit Court that the case turned upon the question whether the patents sued on embodied a pioneer invention; that if complainant's invention was not of the prior art, defendant's machine was so sufficiently differentiated that the claim of infringement could not be maintained; while on the other hand, if complainant's patents were the first to give to the world a workable portable machine for weaving wire fences in the field, a machine distinctly creating a new product, and aptly embodying in their specifications and claims the mechanical arrangements that bring about such a result, the decree below is erroneous."

The Circuit Court of Appeals upon reviewing the state of the art found that the Kitzelman patent, one of the patents sued on, was entitled to be treated as embodying primary invention and to such liberal construction as brought defendant's machine within it. But the Supreme Court found with the Circuit Court that it was not a pioneer patent, and said of it:

"In view of what passed in the Patent Office and the state of the art, we cannot regard the Kitzelman patent as a pioneer patent, but think its claims must be limited in their scope to the *actual* combination of the essential parts shown and cannot be construed to cover other combinations of elements of *different construction* and arrangement."

Concerning the effect of the defendant's patent, the Whitney patent, the Supreme Court says:

"Considering the complainants' and Whitney

as alike having improved on the prior act, the question is whether the specific improvement of the one actionably invaded the domain of the other. *The presumption from the grant of the letters patent is that there was a substantial difference between the inventions.*”

It will be seen that all the Courts before which the case was heard concurred in the different rule of construction as applicable to pioneer inventions and those which are mere improvements. The Supreme Court in concluding its opinion, says:

“For the reasons given in treating of the Kitselman patent we think that none of the complainant’s patents embodied primary invention, and we concur with both the Courts below that, this being so, the differences in means and operation between defendant’s machine and the others were such that there was no infringement. It does not seem necessary for us to enumerate these differences in respect of the other three patents. This was well done in the Circuit Court, and the Circuit Court of Appeals accepted the view of that Court as to the absence of infringement if primary invention did not exist. We are content with that conclusion.”

The case of *Westinghouse vs. Boydel Power Brake Co.*, 170 U. S. 537, from which the definition of the term “pioneer” is taken, as fully quoted above in discussing the *Cimiotti Unhairing Co.* case and the *Singer Mfg. Co.* case, points to an abuse even in finding infringement of “pioneer” claims, and lays down a restriction, which it will be well to note. Mr. Justice Brown, who delivered the opinion of the Court, quotes from Mr. Justice Grier in *Burr vs. Duryee*, 1 Wall. 531, 572:

*“An infringement involves substantial identity whether that identity be described by the terms ‘same principle,’ same ‘modus operandi’ or any other. The argument used to show infringement, assumes that every combination of devices in a machine which is used to produce the same effect is necessarily an equivalent for any other combination used for the same purpose. This is a flagrant abuse of the term ‘equivalent.’ ”

The opinion of Mr. Justice Brown then proceeds:

“We have no desire to qualify the repeated expressions of this Court to the effect that, where the invention is functional, and the defendant’s device differs from that of the patentee only in form, or in a rearrangement of the same elements of a combination, he would be adjudged an infringer, even if, in certain particulars, his device be an improvement upon that of the patentee. But, after all, even if the patent for a machine be a pioneer, the alleged infringer must have done something more than reach the same result. He must have reached it by substantially the same or similar means, or the rule that a function of a machine cannot be patented is of no practical value. To say that the patentee of a pioneer invention for a new mechanism is entitled to every mechanical device which produces the same result is to hold, in other language, that he is entitled to patent his function. Mere variations of form may be disregarded, but the substance of the invention must be there. As was said in *Burr vs. Duryee*, 1 Wall. 531, 573, an infringement is a copy of the thing described in the specification of the patentee, either without variation or with such variations as are consistent with its being in substance the same thing. If the invention of the patentee be a machine, it will be infringed by a machine which incorporates in its structure

and operation the substance of the invention; that is, by an arrangement of mechanism which performs the same service or produces the same effect in the same way or substantially the same way, etc. That two machines produce the same effect will not justify the assertion that they are substantially the same, or that the devices used are therefore mere equivalents for those of the other."

It must be remembered that this language is used in respect to primary patents. That the principles there stated find no place in construing patents for mere improvements is plainly indicated further along in the opinion where it says:

"Conceding that the functions of the two devices are practically the same, the means used in accomplishing this function are so different that we find it impossible to say, *even in favor of a primary patent, that they are mechanical equivalents.*"

The case of *Boyd vs. Janesville Jay Tool Company*, 158 U. S. 260, is particularly applicable to the case at bar, in that the patent sued on was not a pioneer, and the defendant was operating under a patent of its own. Under these circumstances the Court limited the patent sued on to its *precise* devices, and not finding these *precise* devices in defendant's machine, held that there was no infringement. Mr. Justice Shiras delivered the opinion of the Court. He said:

"It clearly appears that Boyd was not a pioneer in this department of machinery. Many inventors had preceded him, and many patents had been issued for improvements in hay car-

riers in form and purpose similar to those described in Boyd's specification. We think the case is one where, in view of the state of the art, the patentee is only entitled, at the most, to the *precise* devices mentioned in the claims."

The opinion then states that the appellant has failed to show that the defendants have used the particular devices to which Boyd can be considered entitled. It quotes from *Pavement Co. vs. City of Elizabeth*, 4 Fish. 189:

"The grant of the letters patent" (referring to the complainant's and defendant's patents) "was virtually a decision of the Patent Office that there is a substantial difference between the inventions. It raises the presumption that, according to the claims of the latter patentees, this invention is not an infringement of the earlier patents."

The opinion concludes:

"Doubtless, if the Boyd patent contained an invention entirely new, and first adapted to the end sought, such differences" (referring to the differences between the complainant's and the defendant's machines) "might be regarded as formal and evasive. But, coming as he did in the train of the numerous inventors that had preceded him, whose inventions had been patented and put into practical use, we must conclude that Boyd, if entitled to anything, is only entitled to the *precise* devices described and claims in his patent. Of course, it follows that if the defendant's specific devices are different from those of Boyd, no combination of such devices could be deemed an infringement of any combination claimed by Boyd."

This ruling is directly applicable to the present case. The Strain patent sued on is not a pioneer patent. The state of the art shows that, if valid at all, it must be confined to its precise devices. These precise devices are not found in the appellees' machine, and there can, therefore, be no infringement.

Careful examination of appellant's brief (copy of which has been received since the writing of the foregoing), discloses no reason for modifying anything herein stated.

On pages 15 and 16 of appellant's brief is contained the following relative to the Strain invention:

“His invention resides broadly in the use of the individual rollers, each mounted independently of the other, and each separately and independently adjustable toward and from the carrier belt.”

This, we believe, is an erroneous statement, for which no foundation is found in the letters patent in suit nor in the claim thereof. At most, all that can be contended for under claims 1 and 10 of the letters patent in suit is that its fruit runway shall be formed of two parallel members, one of said members being non-movable and the other a rotary member, the rotary parallel member being composed of a series of end to end rollers independently adjustable toward and from the non-movable parallel member. In appellees' device no such formed fruit runway is present. As previously pointed out, in appellees' machine the fruit runway is formed of two non-rotative parallel members, one of which members is provided with cushioned graduated outlet openings. To hold appellant's invention to reside in the use of

independently adjustable rollers, is to give to the letters patent that which was refused by the Patent Office.

The only distinction between claims 1 and 10 resides in claim 10 calling for the specific supporting brackets for the end to end rollers and the specific means for adjusting the brackets, which supporting brackets and adjusting means are eliminated from claim 1. This is our understanding of the difference between the two claims in suit, and in this we are supported by the decision of his Honor, Judge Wellborn, and equally so by the appellant, for on page 43 of appellant's brief we are told "Claim 10 differs from claim 1 in its reference to the means for supporting the rolls." Thus we find each claim calls for a fruit runway composed of two parallel members, one being non-movable and grooved to receive a propelling rope for the fruit runway, and the other member being rotary and composed of a plurality of end to end rollers independently adjustable toward and from the non-movable grooved member. As stated, no such constructed fruit runway is found in appellees' machine.

On page 73 of appellant's brief the prior references are treated as "paper conceptions." Just how this applies to the California grader admitted by complainant's witnesses and equally so by all of defendant's witnesses not only to have been a practical and successful machine, but one in use at the present time, we are at a loss to understand. Throughout his brief, appellant has treated the Ish patented grader and the California grader as one and the same machine. Such is not the case. In the Ish

patent the fruit runway is formed of two parallel members, one being a non-movable member and the other a rotary member composed of a single stepped roller, and a traveling belt working over the non-movable member for propelling the fruit through the machine. The California grader differs from the Ish grader in this—of the two parallel members constituting the fruit runway, the non-movable member is grooved and within said groove works a propelling rope for the fruit, the opposing member of the fruit runway is a rotary one composed of a series of end to end rollers, brackets for the rollers, and means for adjusting the brackets supporting the end to end rollers.

This California grader if made for the first time after the issuance of the Strain patent in suit, would constitute an infringement of claims 1 and 10 of the reissue letters patent. Such being the case, the prior use and continued use of the said machine anticipates the said claims and the same are invalid.

Of the so-called “paper conceptions, the patent to Hutchins, Ish, Ellithrope, Stevens, and Dillman were cited by the Patent Office in anticipation of the original claims as filed in connection with the application on which the claims in suit were granted. At such time no effort was made to differentiate the inventions of the rejected claims from such patented devices. In fact, the rejection was based on said prior patents acquiesced in and the broad claims cancelled. Appellant is estopped from now claiming the non-pertinency thereof and from having the claims expanded to cover that which was rejected and cancelled.

We submit that these conclusions are fully proven.

CONCLUSION.

First. The lower court properly held that claims 1 and 10 of the reissue letters patent in suit had not been infringed by the appellees herein.

Second. That said claims 1 and 10 are invalid by reason of the existing prior art and more particularly so by reason of the admittedly prior use of the California grader.

Respectfully submitted.

N. A. ACKER,
WM. M. HIATT,
H. L. CARNAHAN,

Solicitors and Counsel for Appellees.

N. A. ACKER,
Of Counsel.

No. 2232.

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Fred Stebler,

Complainant and Appellant,

vs.

Riverside Heights Orange Grow-
ers Association and George D.
Parker,

Defendants and Appellees.

REPLY BRIEF OF APPELLANT.

The trial court decreed that claims 1 and 10 were good and valid in law. No appeal has been taken from such decree by defendants, although after the court announced that it found the patent in suit valid and that said claims 1 and 10 were not anticipated by anything shown in evidence by defendants, defendants insisted upon the decree setting forth such finding of validity. Defendants are, therefore, met *in limine* with the question: is the validity of such patent or of either of such claims open to question by them in this court upon appellant's appeal? The assignments of error raise the single question of infringement.

Leaving this question for the court to determine, we submit that the decree of the lower court is correct as to the validity of the patent in suit and as to each of said claims.

In determining the question of anticipation of an invention the first and primary inquiry is,—*does the alleged anticipating device have the same mode of operation and secure the same result in substantially the same manner?* If this be answered in the negative, no anticipation is shown.

This is emphasized by this court in its opinion in *Los Alamitos Sugar Co. v. Carroll* (173 Fed. 280), in which it is stated:

“A device which does not operate on the same principle cannot be an anticipation.”

There is not a single witness who testifies that independent adjustment of the grading-opening in the Ish or California grader can be secured. This new result characterizes the Strain invention and refutes the statement of appellees, in their brief (page 76), that:

“This California grader, if made for the first time after the issuance of the Strain patent in suit, would constitute an infringement of claims 1 and 10 of the re-issue letters patent. Such being the case, the prior use and continued use of the said machine anticipates the said claims and the same are invalid.”

A claim in a patent must be read in the light of the drawing and specifications of the patent which show the purpose of the combination and the objects sought and obtained and the principles invoked in obtaining that object.

As said by the Supreme Court in *Bates v. Coe* (98 U. S. 31):

“Sufficient has already been remarked to show that the invention, in its primary feature, is an improved machine for drilling, composed of the devices pointed out in the specification, which operate and perform the functions therein described, and which by their joint operation in the manner described accomplish the patented result.”

“Where there is only one combination of an entire character, incapable of division or separate use, the defenses of the kind mentioned must be addressed to the invention.”

“Devices in one machine may be called by the same name as those contained in another, and yet they may be quite unlike, in the sense of the patent law, in a case where those in one of the machines perform different functions from those in the other. *In determining about similarities and differences, courts of justice are not governed merely by the names of things, but they look at the machines and their devices in the light of what they do or what office or function they perform, and how they perform it, and find that a thing is substantially the same as another, if it performs substantially the same function or office in substantially the same way to obtain substantially the same result; and that devices are substantially different when they perform different duties in a substantially different way, or produce substantially a different result.* Cahoon v. Ring, 1 Cliff. 620.”

As said by Circuit Judge Putnam of the First Circuit in *American St. Car Adv. Co. v. Newton Co.* (82 Fed. 732-735):

“We do not find it necessary to discuss individually the patents thus cited, or to explain precisely how they bear on each of the topics referred to. *It is sufficient to say that none of them anticipate all the elements found in the claim in issue, and*

none of them are capable of being operated or used in the manner in which complainant's device was intended to be operated and used, as clearly shown by the specification."

The California grader would not infringe the Strain patent, *as the object sought and obtained by Mr. Strain cannot be secured by the Ish or California machine.* The very fact that manufacturers and users have deviated from the exact form of the Ish patent, in many ways, to render it more efficient in use and with all such modifications and improvements failed to attain Mr. Strain's purpose or to utilize the principle of independent and individual control or adjustment of each grade-opening without effecting an adjacent grade-opening, proves conclusively that such principle was not obvious even to the most skilled mechanic in that art. These facts prove most conclusively the presence of invention in the Strain conception.

As said by the Supreme Court in *Webster Loom Co. v. Higgins* (105 U. S. 580, 591):

"But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skillful persons. It may have been under their very eyes, they may almost be said to have stumbled over it; but they certainly failed to see it, estimate its value, and bring it to notice. * * * Now that it has succeeded, it may seem very plain to anyone that he could have done it as well. This is often the case with inventions of the greatest value."

As said by the court in *Bates Mach. Co. v. Wetter Numbering Mach. Co.* (136 Fed. 776), in sustaining the patent there before it:

“The matter is so simple that there is a temptation to conclude that the mere elimination of the screws, leaving the pins to perform the entire function of fixing the position of the plates, and attaching them to the frame, does not show invention, but, on the other hand, such arrangement appears to be highly useful.”

The courts have many times remarked that it was the seemingly obvious and simple things which were the most obscure, and as said by Mr. Justice Brown in *The Barbed Wire Case* (143 U. S. 154):

“In the law of patents it is the last step that wins. It may be strange that, considering the important result obtained by Kelly in his patent, it did not occur to him to substitute a coiled wire in place of the diamond-shaped prong, but evidently it did not; and to the man to whom it did ought not to be denied the quality of inventor. There are many instances in the reported decisions of this court where a monopoly has been sustained in favor of the last of a series of inventors, all of whom were groping to attain a certain result, which only the last one of the number seemed to grasp.”

The various changes and improvements which were made from time to time in the Ish or California grader, as referred to on page 46 of appellee's brief, served only to lengthen out the machine and provide for more access of the packers to the fruit bins. None of these manufacturers or improvers had any conception of the individual and independent control of the several grade-openings by the operator. They all retained the fixed relation of each grade-opening to the grade-opening adjacent and retained the feature of construction and relation of the parts that compelled the user of the

machine to separate his fruit according to the distinction in sizes or grades set by the manufacturer and prohibited the user from individual control. (See defendants' exhibit model of California sizer.) It is absurd to argue that any machine (so inherently dependent upon a single adjustment of one grade-opening coincidently adjusting all the grade-openings simultaneously and to the same degree) embodies the Strain invention of independent and individually controllable grade-openings, or that such a machine anticipates, *i. e.*, shows and embodies such feature and principle of independent and individual control of each grade-opening independent of each other grade-opening, when in fact such machine does not embody such principle nor can such result in any way be secured by such machine. It is for these reasons appellant insists that the Ish or California machine fails utterly to anticipate or to show want of invention in the patent in suit. Every witness in this case has testified that individual and independent adjustment of the grade-openings separately of each other cannot be secured in the Ish or California grader. Defendants' expert Cobb admits this. [Transcript page 473, Q. 261.]

No prior device is an anticipation which cannot be made to produce, without substantial alteration of its construction, the same results as those of the subsequent device.

Ryan v. Newark Spring Mattress Co., 96 Fed.
100;

Tannage Co. v. Zahn, 70 Fed. 1003;

Merrow v. Shoemaker, 59 Fed. 120.

The Bailey patent [Transcript page 544] may be dismissed from serious consideration for two important reasons. First: it has been shown by the evidence that this is a mere paper conception which was impractical and never went into use and never in fact had any place in the art and from it no one in fact gained any knowledge and the paper conception of Mr. Bailey was without utility or use in the art and the patent is very evidently simply a "find" of counsel for appellees when searching the patent records for something upon which to found a defense.

"This defense presents the common instance of a patent which attracted no attention and was commercially a failure, being set up as an anticipation of a subsequent patent which has proved a success, because there appears to be in the mechanism described a possibility of its having been, with some alterations, adaptable to the process thereafter discovered."

Carnegie Steel Co. v. Cambria Iron Works, 185
U. S. 425.

But if it were admitted for the purpose of argument that such Bailey patent did disclose something of utility and was entitled to a place in the art as a practical and useful machine, a second important reason remains for its elimination as an anticipation. Both the machine of the Strain patent and the defendants' machines use a belt and the claims under consideration call for combinations in which belts are used. The Bailey patent does not show a belt and a belt could not be used in a machine organized as Mr. Bailey proposed to make it. The rotating element 3 of the Bailey patent, which car-

ries the fruit around, must be made of wood or metal or other stiff material which will turn as a table. A belt cannot be operated in this manner. This shows that the Bailey patent cannot be used by appellees as an anticipation of the combinations of respective claims 1 and 10, and that only by a process of reorganization and rearrangement can either the Strain machine or defendants' machines be deduced therefrom. The grooved guide for supporting the belt and keeping it in place is absent from the Bailey conception. It is necessary in both the defendants' machines and in the Strain machine, and performs the function of centering the belt and supporting the belt against the weight of the fruit. In both the Strain machine and the defendants' machines the longitudinally moving belt is necessarily supported on a fixed support and a grooved guide is formed in such support to prevent the displacement of the belt laterally in either direction. This essential feature of the Strain and defendants' machines is utterly lacking in the Bailey conception.

There are many reasons why the Hutchins patent fails as an anticipation. This patent, like the Bailey, is a mere paper conception. It has never had any place in the actual art. The Hutchins machine is unknown. It is impractical for the reasons pointed out by appellant's expert Mr. Knight (appellant's opening brief, page 67) and the testimony of Mr. Stebler and Mr. Stevenson [Transcript pages 612-619, 721-723, and 765.]

This Hutchins patent also fails as it does not answer to the longitudinal extension of the machine in a hori-

zontal plane, as called for by the Strain patent and claims. This is tersely explained by Mr. Knight:

“As a complete machine, comprising a series of end to end elements, the machine is different *in that the elements are arranged one above another instead of end to end.*”

This distinction between the Hutchins conception and the Strain machine is also true of the defendants' machine and as we have heretofore pointed out illustrates the true meaning of the term “end to end” in the claims of the Strain patent.

Another and vital distinction between this Hutchins conception and the Strain and defendants' machines is that the principle of operation of the Hutchins conception is different from the principle of operation of the Strain and defendants' machines. Bearing in mind that the principle of operation is the first test as to similarity of machines and of comparison of inventions, it is seen that this renders the Hutchins patent ineffective as an anticipation. In the Hutchins conception the intermingled fruit drops onto the first roll, the *largest fruit rolls off the end of that roll*, while all smaller drops through between the roll and moving member, and subsequently each succeeding size is separated and *rolled off the end of a roll*, the sizes being separated successively in accord with the *largest* remaining fruit and all smaller sizes keeping up the drop. In defendants' machines, as in the Strain machine, the smaller sizes are dropped through between the belt and roller forming the respective grading-openings, the separation being made as to successively larger sizes, commencing with the *smallest* first, and only one drop

of any of the fruit being permitted. The separation as to size is effected by permitting only the given size to escape through the given grading-openings.

In Hutchins' theory of a machine the drop of the fruit between the roller and belt is of all the fruit except the largest size, which is carried the length of the roll by the conveying means and is rolled off the end of the roller to suitable receiving means. The individual roller does not contact with any of the fruit except this size. In defendants' and the Strain machines, on the other hand, a single size of fruit is separated by passing through a given grade-opening, while all the other fruit is carried along on such rollers and belt by such openings.

After explaining these differences in the mode and principle of operation of the Hutchins conception and the Strain and defendants' machines, Mr. Knight says:

"In regard to the machine as a whole, *its distinctive principle is different.*"

As said by this court in *Los Alamitos Sugar Co. v. Carroll*, 173 Fed. 280, 284:

"A device which does not operate on the same principle as that of a patent cannot be an anticipation."

In appellees' brief it is admitted that appellees do not contend that any of the many other patents introduced in evidence are anticipations. These other patents, in fact, only show the extent of the novelty of the Strain invention.

As said by the Circuit Court of Appeals for the First Circuit in *Forsyth v. Garlock* (142 Fed. 461, 463):

“The citation of a large number of patents as anticipations tends to strengthen rather than weaken the patent sued upon, by showing that the trade has long and persistently been seeking in vain for what the complainant finally accomplished.”

Supported, as it is, by the abundance of evidence of the public adoption and general use of the Strain invention, and its entire superseding of all other machines for the purpose, the Strain patent is of unchallengable validity.

As said by the Supreme Court in *Winans v. Denmead* (15 How. 340):

“Its substance is a new mode of operation, by means of which a new result is obtained. It is this new mode of operation which gives it the character of an invention, and entitled the inventor to a patent; *and this new mode of operation is, in view of the patent law, the thing entitled to protection.*”

To the same effect see:

McSherry Mfg. Co. v. Dowagiac Co., 101 Fed. 716;

Brown Bag Filling Co. v. Drohen, 140 Fed. 107;

Gandy v. Main Belting Co., 143 U. S. 587;

Farmers' Mfg. Co. v. Spruks Mfg. Co., 127 Fed. 691;

Sayre v. Scott, 55 Fed. 971.

In *Keystone Mfg. Co. v. Adams* (151 U. S. 142) the Supreme Court held that the Henry Adams corn sheller was an invention, and was patentable to him, although

his father, Augustus Adams, had previously made a corn sheller from which that of Henry differed only in reversing the direction of revolution of one of its parts. That part was the revolving beater, which Augustus Adams made to turn in the direction opposite to the desired motion of the ears of corn, expecting it to knock back any ear that might ride upon another, and thus tend to prevent choking the shelling devices. This mode of operation was not entirely satisfactory and Henry Adams reversed the revolution of the beater so that its wings moved in the same direction as that of the ears of corn, thus driving them forward into the shelling devices. The old combination, with that new mode of operation, was highly successful, and the patent thereon was held to be valid and given a liberal interpretation.

“In determining the question of invention, the fact that the article produced supersedes all other appliances, or that a useful or commerical result has been attained, or that the value of the thing patented has been recognized by the public in extensive use, has a controlling if not conclusive effect; and it should have on obvious principles of justice to one who sees that which he suggests constantly adopted and used by others.”

Wilkins Shoe B. Co. v. Webb, 89 Fed. 982;

Krementz v. Cottle Co., 148 U. S. 556;

Western Elec. Co. v. Chicago Co., 14 Fed. 691;

Star Brass Co. v. Gen. Elec. Co., 111 Fed. 398;

Union Biscuit Co. v. Peters, 125 Fed. 601;

St. Louis Flushing M. Co. v. American Co., 156 Fed. 574, 577;

Robbins v. Dueber Watch Case Co., 71 Fed. 186.

Your Honors have said, in *Morton v. Llewellyn* (164 Fed. 693):

“Apart from the presumption of validity that always attends the grant of a patent, the law is that where it is shown that a patented device has gone into general use and has superseded prior devices having the same general purpose, it is sufficient evidence of invention in a doubtful case.”

In constructing an argument against the validity of claims 1 and 10 and in support of an attempted defense of anticipation appellees have fallen into the same error common to those who first appropriate an invention (which has gone into extensive use and proven its commercial value), and then seek by picking out one similarity in one prior device and another similarity in another prior device and by putting the two together form a hypothetical device which did not in fact exist in either of these prior devices and which will approximate the invention and secure its results. The argument of pages 34-40 of appellees' brief is based upon a combination of features and principles of the Hutchins patent and the Bailey patent and of the Ish or California grader and is an admission that the combinations of the respective claims 1 and 10 of the patent in suit are not found in either of these alone. Such an attempted building up of a prior art has been denounced by this court in

Los Alamitos Sugar Co. v. Carroll (173 Fed. 280):

“It is not sufficient to constitute an anticipation that the devices relied upon might by a process of modification, reorganization, or combination, be made to accomplish the function performed by the device of the patent.”

In *Western Elec. Co. v. Home Tel. Co.* (85 Fed. 649), in discussing this principle of patent law, the court says:

“The force of this ruling is made manifest, in its practical application to the rights of parties, by the reflection that all earlier patents set up in defense against a later patent sued upon are but the record evidence of the state the art has reached. The rights under such later patent are subject to what this record actually shows. To change this record, by permitting theoretical modifications of these earlier patents, would be the same, in force, as to change, by interpolations or modifications, any other evidence between the parties.”

This rule is well established.

See

Wayne Mfg. Co. v. Benbow Brammer Co., 168 Fed. 271;

Topliff v. Topliff, 145 U. S.;

Gunn v. Bridgeport Brass Co., 148 Fed. 239;

Zubelt Co. v. Friedman, 158 Fed. 430;

Tannage Co. v. Zahn, 70 Fed. 1003;

Ryan v. Newark Co., 96 Fed. 100;

Simonds R. M. Co. v. Hathorn Mfg. Co., 90 Fed. 201-208;

Gormully & J. Co. v. Stanley Cycle Co., 90 Fed. 279;

Merrow v. Shoemaker, 59 Fed. 120;

Western Elec. Co. v. Capital T. & T. Co., 86 Fed. 776.

“One who takes old devices, with material defects, and retaining the desirable features, adapts them by novel modifications to new and varying

conditions, so as to produce an article superior to all others, is not anticipated by such prior devices.”

Wales v. Waterbury Mfg. Co., 59 Fed. 285.

As the burden of proof is upon the defendants to *prove* anticipation it is not sufficient for them to show that someone *might* have produced a machine capable of performing the function thus accomplished by Robert Strain’s invention but they must show that prior to Robert Strain’s invention someone *did actually produce such a machine in a practical form*.

The entire testimony in this case shows conclusively that the Robert Strain invention for the first time produced a practical and commercial machine in which the user could control as he desired each grade-opening without affecting any other grade-opening. This new result cannot be and must not be ignored or overlooked. It is the very essence of the patent in suit and it is, as we have already shown, and, as is admitted by defendants, found in defendants’ machines.

In reviewing this question of infringement we desire, in addition to the decisions cited on pages 18-27 of appellant’s opening brief, to call attention to the recent decision of the court in

American Caramel Co. v. Glen Rock Co., 201
Fed. 363,

in which the correctness of appellant’s position is demonstrated. The court says:

“The holder manufactured and sold by the defendant is clearly within the range of these claims. Neither of the defendant’s experts have denied that the holder embodied the construction claimed, while

both of complainant's experts have found that this holder embodies *the structure and all of the advantages described and claimed in the patent*. True, it has some features not described in the patent; but these are added to those described in the patent, and not substituted for them. The defendant's holder has certain ribs or creases across its surface and about its margin, no doubt intended to stiffen it; otherwise it has the flanges as claimed by the complainant's patent, which necessarily are produced by like operation. *The idea covered by the patent is completely embraced in the idea expressed in the infringement, although the latter is more comprehensive than the former.*

"'Identity exists with reference to the question of infringement, if the idea of means protected by the patent is found, substantially existing, in the invention practised by the alleged infringer.' Robinson on Patents, vol. 3, par. 892; *Lourie Implement Co. v. Lenhart et al.*, 130 Fed. 122, 64 C. C. A. 456; *Columbia Wire Co. v. Kokomo Steel & Wire Co.*, 143 Fed. 116, 74 C. C. A. 310.

"That the flanges of defendant's holders are segmental or almost semicircular in outline, while in the patent they are shown as rectangular, is not of importance, *since they perform the same functions in either, and their form has, therefore, nothing to do with the essence of the invention. Neither technical distinctions nor differences of appearance are as important in determining questions of identity as the substance of the matter in controversy in arriving at the conclusion whether the real inventive thought has been appropriated by the defendant.*

"'The court will look through the disguises, however ingenious, to see whether the inventive idea of the original patentee has been appropriated, and whether the defendant's device contains the material features of the patent in suit, and will declare infringement, even when those features have been supplemented and modified to such an extent that the defendant may be entitled to a patent for

the improvement.' *Crown v. Aluminum Stopper Co.*, 108 Fed. 845, 48 C. C. A. 72; *Robins v. American Road Mach. Co.*, 145 Fed. 923, 76 C. C. A. 461; *Norton v. Jensen*, 49 Fed. 859, 1 C. C. A. 452; *Dowagiac v. Superior Drill Co.*, 115 Fed. 886, 53 C. C. A. 36."

Defendants have never denied that in their machines they have the independent and individual adjustment of each roller with respect to the surface of the belt, or that this adjustment is for the identical purpose of the Strain invention, or that they employ the individual adjustment of each grading-opening independent of each other grading-opening. The trial court did not base its decree upon any denial of these propositions, *but upon the added function of the overlapping guide-arms* interposed between the rollers in lengthening out the machine and securing the new additional function invented by Mr. Parker. Mr. Parker's patent was granted by the Patent Office to secure to him his added invention, *i. e., the longitudinal adjustment of the grade-openings*. This is an improvement, but the action of the Patent Office is no decision as to whether the Parker machine includes the Strain invention.

In the trial court the decision of this case was based entirely upon the feature of moving the grading-openings longitudinally of the machine by shifting lengthwise the brackets and rollers. *This added adjustment* appellant submits was given a wrong interpretation and effect.

This is apparent from His Honor Judge Wellborn's statement:

"That feature, the end adjustment by reason of the spaces between the rolls in the Parker device and that

in the Strain device, it seems to me makes them different and prevents the latter from infringing upon it."

This is further emphasized by His Honor saying:

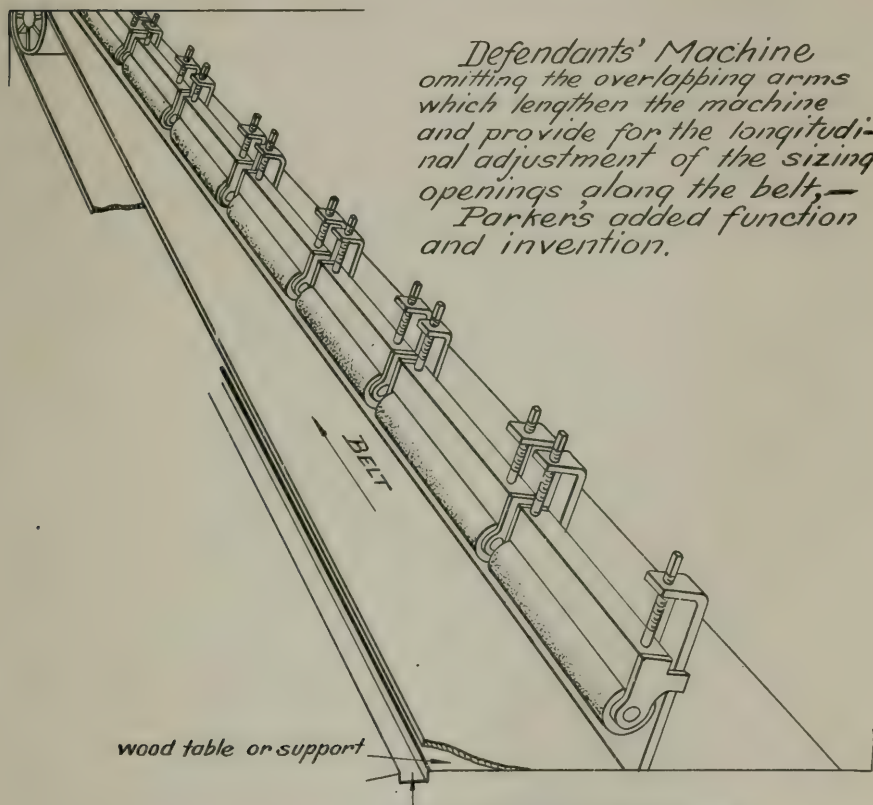
"He (Parker) has introduced the guide-arm in that machine, and they have an apparent function to perform *aside from forming part of the runway.*"

That the lower court actually decided in favor of appellant on all issues of infringement of these two combinations of claims 1 and 10 but dismissed the bill on an erroneous theory of non-infringement because defendants had added an additional function to a part of the element, is clear from His Honor's words:

"That it is true that these guide-arms in a Parker machine perform exactly the same function in the Parker device that they do in the Strain patent, that is, so far as constituting one member of the runway, but there is something more to that guide-arm. It is a part of Parker's invention by which he gets an enlarged bin capacity. It is a part of the end adjustability of the guide-arms and they perform a function in the machine that Parker manufactures which in my mind differentiates it very materially from the Strain patent."

Appellant produces a cut of the defendants' machine, *omitting these overlapping guide-arms.* Otherwise this cut is substantially the same as that found as the second inserted cut opposite page 58 of appellant's brief. Undoubtedly the lower court would have held this machine (without such guide-arms) to have infringed both claims 1 and 10. It held the Miller machine, "complainant's exhibit model of defendants' machine in Pioneer Fruit Co. case" to infringe. Compare this cut with that exhibit. This cut illustrates the fact that all the several elements of the two combinations embraced in

*Infringement illustrated in accord with
lower Court's decision.*



*Defendants' Machine
omitting the overlapping arms
which lengthen the machine
and provide for the longitudinal
adjustment of the sizing
openings along the belt,—
Parker's added function
and invention.*

*groove of the non movable guide
and support for the belt. In this
groove the propelling and centering
chain or belt (attached to main belt)
runs. This groove performs the same
office in the stationary table, that appellants'
non movable grooved guide performs.*

claims 1 and 10 are found in defendants' machines and that the spacing apart of the individual and independent rollers and their brackets is the sole distinction.

The issue of infringement is thus demonstrated to turn *solely* upon the additional function of these guide-arms.

It is clear, therefore, from the decision of the lower court that the decision to be reviewed was not based upon any differentiation as to mechanical devices or any detail of construction or any other structural feature or any proposition than this added function, *i. e.*, longitudinal sliding or adjustment bodily of the independent and individual rollers, and that the lower court did not find any other feature which differentiated defendants' machine from Robert Strain's invention or from either claim 1 or 10 of the patent in suit. The question is then a precise one and a very narrow one, and is wholly determined by answer to the proposition:

"Can a defendant appropriate a patented invention and, while employing its principles and benefits and its mode of operation, by adding an element for an additional function escape the charge of infringement?"

If this question be answered in the negative then the decree of the lower court was wrong and defendants' machines are an infringement and the decree appealed from must be reversed. The authorities settle the question in the negative. See:

Appellant's Opening Brief, pages 25 to 27;

Kisinger-Ison Co. v. Bradford, 97 Fed. 502, 38
C. C. A. 300;

Letson v. Alaska Packers' Ass'n, 130 Fed. 129,
page 143;

Comptograph Co. v. Mechanical Co., 145 Fed.

331;

Walker on Pats., Sec. 352, page 309;

Masseth v. Palm, 51 Fed. 824;

Western Co. v. American Co., 131 Fed. 75, 65

C. C. A. 313;

American Co. v. Wyeth, 139 Fed. 389, 71 C.

C. A. 485.

Defendants urge that each of the defendants' rollers and its brackets form, in conjunction with the belt, "*a distinct sizer, independent of all the others.*" This contention is so plainly unsound as a distinction between the machine of the drawings and specification of the patent in suit, as an embodiment of Robert Strain's invention, as to need only comparison to utterly destroy it. In the machine as shown in the Strain patent each roller is mounted in its own individual brackets and forms in the same sense as defendants' a separate or distinct sizer. But in actual fact and in practical use in both defendants' machines and the machine of the patent in suit each roller does *not* form "*a distinct sizer*" but simply *an independent and individual grading-opening* separately controllable and regulable as the will of the user determines, and this demonstrates the embodiment therein of Robert Strain's invention, and shows the infringement complained of, and is not a demonstration of the absence of infringement. A single grading-opening is not a complete grader or sizer. The comparison, however, is equally true of defendants' machines and the machine shown by Robert Strain in his drawings.

Appellant again calls the court's attention to this fallacy as it is characteristic of the defendants' whole case. It is demonstrated erroneous by a reference to the patent in suit. [Transcript page 164.] Each roller M is mounted at each end in an adjusting arm or bracket N. These arms or brackets N are slidably mounted in blocks O. The brackets N and blocks O of each roller are as independent of those of an adjacent roll as are the corresponding parts in defendants' machines. This is illustrated by the fact that a removal of one roller, its brackets and blocks, has no effect upon the next roller, its brackets and blocks, in any sense in which defendants' rollers, their brackets and adjusting blocks are independent. The difference between defendants' machines and the embodiment of machine of the drawings of the patent in suit *does not exist in one roller, its brackets and adjusting devices forming in conjunction with the belt "a distinct sizer, independent of all others."* This is as true of the machine shown in the patent in suit as it is of defendants' machine. The utter fallacy of Mr. Cobb's testimony, quoted on page 65 of appellee's brief, is thus apparent. He has utterly failed to understand the machine of the patent in suit.

Remove from the defendants' machine one of these so-called "distinct sizers" (*i. e.*, the independent and individual roller and its supporting bracket and adjusting devices), and you have in the same sense removed from the machine one of the sizing openings and thus destroyed the integrity of the machine to the same degree and in the same sense as the removal of one

of Mr. Strain's individual and independent rollers, its brackets and adjusting devices. The correspondence is direct and exact. The only difference in the two machines, *in substance*, is the overlapping guide-arms *employed by defendants for an additional and independent function, i. e.*, a shifting of the delivery point of a given grading-opening along the longitudinal extension of the machine. So far as forming part of the run-way is concerned these guide-arms are the equivalent of Mr. Strain's. The lower court so held, and properly. His Honor said:

"It is true that these guide-arms in a Parker machine perform exactly the same function in the Parker device that they do in the Strain patent, *that is, so far as constituting one member of the run-way.*"

It is true that His Honor finishes this sentence by adding: "But there is something more to that guide-arm." His Honor, however, very correctly finds that so far as constituting the run-way is concerned the use of the overlapping guide-arms has not changed the idea of means of the Strain invention, and that, as shown by the next sentence of his opinion, the distinction which he dwells upon is the added function. His Honor again reiterates this and emphasizes it by saying "they (the overlapping guide-arms) have an apparent function to perform aside from forming a part of the run-way."

As referred to on page 23 of appellant's opening brief, Mr. Strain, in the specification or description of his invention, has stated that he could provide "short grade-rollers," each separately adjustable, "*and more*

than one roller may be adjusted to the same grade, if desired.” [Transcript page 166, page 2 of the Strain specification, lines 15-16.] The result of adjusting two rollers to the same grade is to employ the second roller simply as an idler, or non-grading opening, or space, to carry the fruit to the next succeeding bin, the same as in employing the over-lapping guide-arms in place of such roller. Such roller would not have the function of permitting the roller of such “next succeeding bin” to be slid longitudinally of the machine to vary the point in the machine in which it forms a grading-opening, but such blocked-out roller,—*i. e.*, the second roller adjusted to the same grade,—would only perform the function of a wall on which the fruit bore as carried along by the belt and would not be a grading-opening in the operation of the machine. This shows conclusively the equivalence of the guide-arms as forming a part of the run-way and shows that the Strain machine in this respect has not been deviated from by the defendants by the insertion of their element constructed with such additional function. For all the functions of Mr. Strain’s invention they are, however, the same. The added function is Mr. Parker’s invention, and it is an addition to Mr. Strain’s. This is what the lower court found, but, as appellant submits, erroneously believed the law to hold it non-infringing because of such added function.

Nowhere in the specification of the patent in suit has Robert Strain limited his invention to the use of only that number of rollers corresponding to the number of grades or separations as to size desired to be

made. Nowhere in the art is there any absolute requirement for nine sizes or any other fixed number of sizes. In fact some of the witness have testified that in given orchard runs the oranges run to four or five sizes. Others have testified to making a separation into ten sizes. Mr. Strain says in his specification that short rollers may be used and that more than one roller may be adjusted to the same grade, if desired. He says that his preference is to have a bin for each roller and that usually oranges are separated into nine sizes, but he does not say that in a given quantity of fruit you will always find oranges of each of these sizes, nor is that the fact. This specification of the patent in suit shows the preferred embodiment of the Strain invention. The last of the specification refers to a modification in which short rollers may be used. If two rollers are adjusted to the same grade, *i. e.*, the opening between the belt and two consecutive rollers be the same, then the second roller is idle, as all the fruit of that size passes through between the first roller and the belt and the second roller simply forms a wall in conjunction with the belt, along which the fruit travels to the next grading-opening, in the same manner as the fruit is carried along between the belt and overlapping guide-arms in the Parker machine. This is what the lower court referred to in saying "it is true that these guide-arms in a Parker machine perform exactly the same function in the Parker device that they do in the Strain patent, that is, so far as constituting one member of the run-way." The court does not differentiate on the Strain function performed by these parts but by the additional

function performed by Mr. Parker's guide-arms, and again we see that this suit narrows down to the proposition "Will merely adding a function to a machine or to one of its parts, and yet retaining the old mode of operation and all the old functions and advantages, permit a defendant to appropriate a patented invention, thus unchanged except by an addition thereto?"

In appellees' brief in referring to the rollers of defendants' machines they are termed "an elastic buffer or cushion." Why this term? It is clearly misleading and erroneous. They are wooden rolls. They are non-elastic and they are neither buffers nor cushions. These parts are made in roller form for the very same reason that Robert Strain utilized rotating rollers. This has been fully explained in our opening brief. Defendants' machines would be impractical if they did not use the rotating rolls as one wall of the grading-opening. The rolls rotate upward and away from the pinch and in no sense are elastic.

On page 6 of appellee's brief it is stated that: "there is no provision made for a non-movable grooved guide, mentioned in the patent in suit as constituting one of the parallel members of the fruit run-way."

In the second cut inserted between pages 58 and 59 of appellees' brief the drawing has been stopped just where, if it were completed, it would show the groove in which the propelling chain or belt rests and which hold the wide conveying belts in place against displacement laterally by the weight or by the action of the oranges. The cut produced by appellant in this brief supplies this *in accord with the defendants' machine* and shows the misleading character of the statement

just quoted from appellees' brief. In defendants' machines the stationary guide, within which the groove is produced, extends under the whole of the fruit-carrying belt and the stationary guide or table and the groove performs exactly the same function and in exactly the same manner as in the machine of the drawings of the patent in suit. The only difference is that which would be present in the change of the form of the belt from a round or "rope" form to a flat belt. And if you will demonstrate the plane referred to in claim 1 you will find that this same plane "which passes vertically and longitudinally through the center of said rollers" in the Strain machine, passes vertically and longitudinally through the center of the rollers of defendants' machines and that the table or non-movable guide lies parallel to this plane in both defendants' and the Strain machine for the same purpose and in the same sense. Defendants' machines answer perfectly to this requirement. The purpose in both is the same,—to support and guide the belt.

A "*plane*" passing through the rollers longitudinally and vertically must lie parallel with or to the table or support and to the groove therein of defendants' machines and in the same sense as in appellant's machines. The language or wording of the claim in this respect fits defendants' machine even better than it does the machine as illustrated in the drawings of the patent in suit.

Appellees seek to make much of the use of the words "end to end" in claim 10. In appellant's opening brief, pages 53-59, is found a discussion of this term and its

history. The Patent Office had cited against *Mr. Rayburn's* original claims the patent to Hutchins. To differentiate from Mr. Hutchins' proposed and thoroughly impractical mode of operation embodying a series of rolls arranged one above the other and spaced apart from a stationary member or belt between which roll and belt all the fruit dropped (except one size, which was carried the length of the roll) and to indicate that the invention claimed had to do with a machine in which the grading-openings were arranged in progressive order in longitudinal extension, Mr. Rayburn adopted the phrase "a series of end to end rolls." Mr. Hutchins showed his rolls superposed or one above the other. The words adopted by Mr. Rayburn were not "a series of rolls the end of one abutting the other." It is submitted that the preposition "to" has several meanings; it may mean "toward" or it may mean "at." As the term must be interpreted and is not exact the court will adopt that construction which will preserve to the patent in suit a monopoly of the real invention disclosed thereby.

See authorities cited pages 57-59 appellant's opening brief.

As said by the Circuit Court of Appeals for the Second Circuit, in *Carlson Motor & Truck Co. v. Maxwell Briscoe Co.* (197 Fed. 309, 315):

"The question is not one of nomenclature but of mechanics, and relates not to the names given to the parts of the combination, but to the functions they perform."

To give this term "end to end" the meaning and interpretation thus contended for will only give it a

proper, ordinary and usual meaning and one peculiarly apt in describing the Strain machine in which the rollers do not abut. The term "end to end" was never used to denote there was not or could not be a non-separating or non-grading space between the ends of the rolls, and no such construction had been shown by the Patent Office, as prior to Mr. Strain's invention, to cause the limitation to the placing of the rollers so as to form "a continuous, substantially unbroken rotary member for the front run-way," as appellees would have the court interpret the wording of the claim. Appellees insist that defendants' machines are not provided "with a continuous, substantially unbroken outer rotary wall member for the fruit run-way." Such is not even the terms of either claim 1 or claim 10. In defendants' machines, however, each part of the machine, utilized in separating the fruit, is formed of a longitudinally moving belt and an individual and independently adjustable roller. The terms of claims 1 and 10 do not call for "a continuous, substantially unbroken outer rotary wall member for the fruit run-way." There was no need for such a limitation, and, as said by the Supreme Court in *Topliff v. Topliff* (145 U. S.):

"The object of the patent law is to secure to inventors a monopoly of what they have actually invented or discovered, and it ought not to be defeated by a too strict and technical adherence to the letter of the statute or by the application of artificial rules of interpretation."

And in *Klein v. Russell* (19 Wall. 433):

"The court should proceed in a liberal spirit, so far as to sustain the patent and the construction

claimed by the patentee himself if it can be done consistently with the language which he has employed.”

The spacing apart of the rollers to permit the interposition of the guide-arms and permit the guide-arms to contribute the added function of longitudinal sliding of the respective rollers for the added adjustment conceived by Mr. Parker has not changed the inventive idea produced by Mr. Strain and the substance of Mr. Strain’s invention remains unchanged in defendants’ machines. This is the true test of infringement.

Justice Blatchford says:

“Any improvement in one element of a combination which does not affect its manner of cooperation with the remaining devices will not serve to avoid the charge of infringement.”

Potter v. Stewart, 7 Fed. 215, 18 Blatchf. 561.

As said by the Circuit Court of Appeals for the Eighth Circuit in *Lourie Imp. Co. v. Lenhart* (130 Fed. 122):

“A device which is constructed on the same principle, which has the same mode of operation, and which accomplishes the same result as another by the same means or by equivalent means, is the same device, and a claim in a patent of one such device claims and secures the other.” Citing *Machine Co. v. Murphy*, 97 U. S. 120, 125.

On page 6 of appellees’ brief the statement is made that the cut of defendants’ machine illustrates “a series of aligned non-rotary grading units.” The statement is inaccurate and misleading. As has already been seen the rollers of defendants’ machines

form, in conjunction with the belt, the grading-openings, and the belt is supported in the same manner as in the Strain invention. How defendants' justify the statement that the defendants' machine is made up of a series of aligned non-rotary grading units is not apparent, and such is not the fact.

Appellees' seek to make a point against the patent in suit in a contention that the same is not in terms limited to a machine for grading any given class of fruit. This is true. It is the best adapted machine for sizing oranges. It is because of the control of the operator over each grading-opening, independent of any other grading-opening, that the Strain invention is so readily and peculiarly adjustable from a condition for use in grading oranges, to grading other fruits and nuts. It is the first machine that could be so generally used, and that adaptability is due to Mr. Strain's broad conception of placing the grading-openings each independently within control of the user and not dependent upon the whim of the manufacturer and in fixed relation to each other.

Appellant does not seek to have the court enlarge either claim 1 or claim 10 or to remove any limitation of either of these claims, as appellees urge. Defendants' machines answer perfectly to every limitation of each of these claims, and the only difference between the appellees and the appellant as to the construction to be given to the claims is that appellees contend the claims must be restricted to the exact elements specified in the claims and in the exact form shown and described in the patent in suit, while appellant insists that a reasonable application of the doctrine of equiv-

alents be applied to these claims to protect Robert Strain's invention according to its importance in the art and according to the real merit and scope of the invention. Every element of both of the claims are found in defendants' device, and the only distinction between the machine of the patent in suit and defendants' machines is the spacing apart of the individual and independently adjustable rollers by means of the overlapping guide-arms. This change or addition has not changed the function of the rollers in any manner whatever, and the overlapping guide-arms serve solely to perform an additional function,—the longitudinal adjustment of the rollers lengthwise.

A mechanical equivalent, in the patent law sense, is a device which is substituted in one mechanism for some other device, and to be an equivalent the substituted device must perform the function of the device for which it is substituted, and in substantially the same manner. It is immaterial if such substitute also performs an additional function.

Walker on Pats., Section 352;

Norton v. California Can Co., 45 Fed. 638;

Masseith v. Palm, 51 Fed. 825;

Foss v. Herbert, 2 Fisher Pat. Cas. 31;

Sarven v. Hall, 9 Blatchf. 524;

Cantrell v. Wallick, 117 U. S. 689.

The operative portion of that side of the fruit runway, opposite the traveling or "propelling" belt, as appellees seem to desire to term it, is in defendants' machine made up of the same elements as in the Strain patent,—plus an additional element which has an ad-

ditional function brought into use when the machine is not in operation, but when in operation the functions are the same and the interposition of this element, the guide-arms, still enables defendants' to make up the operative part of the fruit run-way of grading-openings consecutively increasing along the longitudinal extension of the belt in the same manner as proposed by Mr. Strain for the first time in the art, and to form such grading-openings in the manner proposed by Mr. Strain,—*i. e.*, by the belt on one side and the individual and independently adjustable roller on the other. Furthermore defendants mount each of these individual rollers in individual brackets, the form only slightly differing from that of the drawings of the patent in suit,—and these brackets, the adjusting screws thereof, etc., lying in the same plane with respect to the belt and its grooved support, guide or table as do the similar elements in the patent in suit. In fact every analysis given of the various elements of claims 1 and 10 brings the conclusion that the only difference is in Mr. Parker's added adjustment. He has taken the whole of the Strain invention and seeks to escape the charge of appropriation solely by adding an additional advantage (?).

On page 17 of appellees' brief there are printed two revised claims, in an attempt to demonstrate that appellant is seeking to have the court read out of or omit from the claims some kind of a limitation supposed to exist therein, which does not correspond with the interrelation of parts in the defendants' machines. Unfortunately for appellees each of such proposed claims have only omitted such parts of claims 1 and

10 of the patent in suit as are clearly embodied in defendants' machines, and the futility of appellees' proposition is apparent from a comparison thereof.

The futility of appellees' attempt to show that the claims in suit were limited (to matters not found in defendants' machines), during the prosecution of the application for patent in the Patent Office, is demonstrated on pages 18 and 19 of appellees' brief. Original claim 1 of the application, according to appellees, differed from claim 1 of the re-issue patent in suit "only by incorporating into the claim the limiting expression 'independent' as applied to the adjustable rollers; and the expression, 'plane which passes vertically and longitudinally through the center of,' as applied to the location of the guide, and the further limitations that the guide shall be non-movable and grooved, and that the rollers and guide shall form the fruit runway of the grader."

If this be an accurate statement of the alleged limiting of claim 1, it is found that the defendants' machines answer fully to each of these limitations.

1. Defendants' machines each contain a plurality of independent transversely adjustable rotating rollers, thus conforming to what appellees insist was the first limitation thus incorporated in the claim.

2. In defendants' machines a plane which passes vertically and longitudinally through the center of the rollers is parallel with the grooved guide or table support for the belt, thus conforming to the other limitations thus incorporated, as appellees' contend, in the claim.

It is clear that the rollers and the belt or grooved guide for the belt form the run-way in both defendants' and appellant's machines. The lower court so found.

One of the most remarkable statements that appellant's counsel has read in a brief for a long time is that contained on page 21 of appellees' brief, *i. e.*:

"It will be noted that claim 10 calls for the same elements as rejected claim 2, with the exception that the rollers shall constitute one member of the fruit run-way and are limited to the extent that said rollers shall be arranged 'end to end,' " etc.

Original claim 2 of the Strain application called for but one element, to-wit: a plurality of transversely adjustable rotating rollers. No other element is mentioned in said original claim 2. It was not directed to any such combination as is expressed in the tenth claim of the re-issue patent. Furthermore the tenth claim was allowed without any such action by the Patent Office. See appellant's opening brief, pages 51-54. This claim most certainly cannot have less scope than it would have in the Rayburn patent. Nothing in the Strain application can limit. Its scope was determined, according to appellees' contention in the Rayburn application proceedings. All these contentions by appellees may be substantially disregarded, however, as every one of the alleged limitations defendants' machine respond to and embody.

In appellees' brief, page 54, an attempt is made to throw mud at the fact that machines embodying Robert Strain's invention have totally displaced all the Ish or California graders. The fact remains that

although the Ish patent expired five years ago, not a single new Ish or California grader has been manufactured or placed in use by anyone. The facts are that the Strain invention was of such merit as to compel the users of California graders to displace them with the Robert Strain type of machine. This is proven not only by the testimony of Mr. Stebler and Mr. Whiffin, on behalf of appellant, but by every one of appellees' witnesses.

The fact remains that the inventive idea expressed in the patent in suit, and in the combinations embraced by claims 1 and 10, are the formation of the grading-openings between the supported belt and the rollers, mounting each roller independently of the other rollers and thus giving the user the absolutely perfect control of the grading-opening without affecting any of the other grading-openings. Appellant firmly believes that this court will give to the patent in suit such a construction as will reserve to the owner of the patent in suit the substantial monopoly intended by the patent law of this inventive idea. This is particularly and peculiarly a case where such a construction can be given to the claims in suit without eliminating from them any limitation expressed in the claims. Such action by this court would only give appellant a monopoly of what Mr. Strain added to the art. It is submitted as the proper construction of the patent in suit.

As said by the Supreme Court in *Keystone Mfg. Co. v. Adams* (151 U. S. 139):

“But when in a class of machines so widely used as those in question, it is made to appear that at last, after repeated and futile attempts, a machine has been contrived which accomplishes the result desired, and when the Patent Office has granted a patent to the successful inventor, the court should not be ready to adopt a narrow or astute construction, fatal to the grant.”

In appellees' brief many references are found to “pioneer” or “primary” inventions as distinguished from inventions which, although of broad character, are not strictly the very first invention in a given art or line, and appellees seem to insist that no liberality of construction whatever is to be indulged in by the court in the interpretation of the scope of the claims for any other invention than such a truly “pioneer” or “primary” invention.

This is not the true rule of law. It is not necessary for this court to hold that Robert Strain's invention was a “pioneer” or “primary” one. The true rule of law is that the scope and breadth of range of equivalents depends upon and varies with the degree of invention or the importance of the invention, and that an invention may be of broad character without being a truly “pioneer” or “primary” invention. This rule has been recognized by this court in *Los Alamitos Sugar Co. v. Carroll* (173 Fed. 280), and in *Parker v. Stebler* (177 Fed. 210). It is well settled that a patent can be very broad in scope and broad enough to carry very broad differences of details in mechanism without requiring that it shall occupy the position,

held by so few patents or inventions, of being of a strictly "primary" or "pioneer" character.

2 *Rob. on Pats.*, section 526, page 141;

Renwick v. Pond, 10 Blatch. 39, Fed. Cas. No. 11702;

Brush Elec. Co. v. Ft. Wayne Elec. L. Co., 40 Fed. 833;

Brush Elec. Co. v. Western Elec. L. & P. Co., 43 Fed. 537;

Brush Elec. Co. v. Electric Imp. Co., 52 Fed. 975;

Walker on Pats. (4th Ed.), pages 308, 309, 312.

Even though the invention of a complainants' patent is not of a pioneer or primary character, and notwithstanding a defendant's means and mode of operation are different and even patented, yet there may be infringement.

Mason v. Graham, 23 Wall. 261;

Ives v. Hamilton, 92 U. S. 426;

Machine Co. v. Murphy, 97 U. S. 120;

Elizabeth v. American Nicholson Pav. Co., 97 U. S. 137;

Clough v. Gilbert & B. Mfg. Co., 106 U. S. 166;

Western Elec. Co. v. La Rue, 139 U. S. 601;

Hoyt v. Horne, 145 U. S. 302.

In the case of *Continental Paper Bag Co. v. Eastern Paper Bag Co.* (210 U. S. 405), the defendant and appellant contended that the patent in suit not

being a "pioneer" or "primary" patent, was not infringed, claiming:

"Identity of means and of operation are necessary to constitute infringement of a secondary patent."

This the Supreme Court refused to uphold, finding the patent infringed, and saying:

"The two questions, therefore, which remain for decision, are the jurisdiction of the court and the question of infringement. We will consider the latter question first.

"It does not depend, counsel for the Continental Company says, 'upon any issue of fact, but does depend, as questions of infringement' sometimes do, upon a 'point of law.' This point of law, it is further said, has been formulated in a decision of this court as follows: 'Where the patent does not embody a primary invention, but only an improvement on the prior art, and defendant's machines can be differentiated, the charge of infringement is not sustained.' Counsel for respondent do not contend that the Liddell invention is primary within the definition given of that term by petitioner. Their concession is that it is 'not basic, in the sense of covering the first machine ever produced to make self-opening square bags by machinery.' They do not contend, however, that it is one of high rank, and if it be given a 'fair construction and scope, no matter whether we call it basic, primary, or broad, or even merely entitled to be construed, as covering obvious mechanical equivalents, the question of infringement of the claims in suit by petitioner's machine becomes mechanically, and from a patent law standpoint, a simple one, in spite of slight differences of operation and of reversal of some of the moving parts.' The lower courts did not designate the invention as either primary or secondary. They did, however, as we shall presently see, decide that it was one of high rank and entitled to a broad range of equivalents. It becomes neces-

sary, therefore, to consider the point of law upon which petitioner contends the question of infringement depends.”

“The citation is from *Cimiotti Unhairing Co. v. American Fur. Ref. Co.*, 198 U. S. 399, 49 L. Ed. 1100, 25 Sup. Ct. Rep. 697, and *Kokomo Fence Mach. Co. v. Kitselman*, 189 U. S. 8, 47 L. Ed. 689, 23 Sup. Ct. Rep. 521, was adduced to sustain the proposition. But the whole opinion must be considered, and it will be seen from the language which we shall presently quote that it was not intended to say that the doctrine of equivalents applied only to primary patents.

“We do not think it is necessary to follow counsel for petitioner in his review of other cases which, he urges, sustain his contention. The right view is expressed in *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 207, 38 L. Ed. 121, 130, 14 Sup. Ct. Rep. 310, as follows: ‘The range of equivalents depends upon the extent and nature of the invention. If the invention is broad or primary in its character, the range of equivalents will be correspondingly broad, under the liberal construction which the courts give to such inventions.’ And this was what was decided in *Kokomo Fence Mach. Co. v. Kitselman*, *Cimiotti Unhairing Co. v. American Fur. Ref. Co.*, and *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609, 51 L. Ed. 645, 27 Sup. Ct. Rep. 307. It is from the second of those cases, as we have seen, that the citation is made which petitioner contends the point of law upon which infringement depends is formulated; but it was said in that case: ‘It is well settled that a greater degree of liberality and a wider range of equivalents are permitted where the patent is of a pioneer character than when the invention is simply an improvement, maybe the last and successful step, in the art theretofore partially developed by other inventors in the same field.’

“It is manifest, therefore, that it was not meant to decide that only pioneer patents are entitled to

invoke the doctrine of equivalents, but that it was decided that the range of equivalents depends upon and varies with the degree of invention. See *Ives v. Hamilton*, 92 U. S. 426, 23 L. Ed. 494; *Hoyt v. Horne*, 145 U. S. 302, 36 L. Ed. 713, 12 Sup. Ct. Rep. 922; *Deering v. Winona Harvester Wks.*, 155 U. S. 286, 39 L. Ed. 153, 15 Sup. Ct. Rep. 118; *Walker, Patents*, Sec. 362; *Robinson, Patents*, Sec. 258."

In *Clough v. Gilbert & Barker Manufacturing Co.*, 106 U. S. 166, Mr. Justice Blatchford says:

"The combination of the first claim of the Clough patent being new, and, consequently, there never having been any valve arrangement applied to regulate the flow of gas in such a combination, the premises on which the decision of the court below proceeded fail. Clough is entitled to the benefit of the doctrine of equivalents as applied to the combination of the burner, surrounding-tube, and regulating-tube, covered by the second claim of his patent. The regulation in the defendants' burners was by a tubular valve on the outside of the perforation instead of on the inside, and performing its work by being screwed up or down, as in Clough's. Although in the Clough structure the burner and surrounding-tube revolve together in adjusting their position in reference to that of the tubular valve, so as to let in or turn off the supply of gas through the perforations, and although in the Clough structure the flame revolves by the revolution of the burner, and although in the defendant's burners the revolution of the surrounding-tube regulated the supply of gas through such perforation, and neither the burner nor the flame revolved, the defendants' valve arrangement must be held to have been an equivalent for that of Clough to the full extent to which that of Clough goes, involving, perhaps, patentable improvements, but still tributary or subject to the patent of Clough. It is true that that patent de-

scribes the tubular valve as being inside of the burner-tube. But Clough was the first person who applied a valve regulation of any kind to the combination to which he applied it, and the first person who made such combination, and he is entitled, under decisions heretofore made by this court, to hold as infringements all valve regulations, applied to such a combination, which perform the same office in substantially the same way as, and were known equivalents for, his form of valve regulation. The record shows that prior to the existence of the appellants' burner it was common in gas burners to check the flow of gas out of the burner by applying an obstruction operated by a screw indifferently outside or inside of the burner. It follows, from these considerations, that the defendants infringed the second claim of the Clough patent."

The Court of Appeals for the Eighth Circuit, in *Lewis Blind Switch Co. v. Premium Mfg. Co.* (163 Fed. 950), says:

"A patent for an invention which is neither primary nor a slight improvement on the prior art, but possesses substantial patentable novelty, covers a reasonable range of equivalents."

"In interpreting the claims of a patent, proper regard should be had to the natural import of the terms in question, the context and the specification."

"The question of infringement turns upon the character of Lewis' invention. We regard it as neither primary nor a slight improvement on the prior art, but as possessing enough of patentable novelty to command a reasonable range of equivalents. The defendants' machine embodies every element or its equivalent, of the claims which we sustain, and accomplishes substantially the same result in substantially the same way."

In *Brown Bag-Filling Mach. Co. v. Drohen* (140 Fed. 97, 100) it is said:

“The Cummings patent in suit, in my opinion, is for a new machine or combination which produces a new and useful result, entitling the patentee to invoke the doctrine of equivalents. The claims secured by the patentee are such that in the determination of the question of infringement by defendants’ apparatus the forms and dissimilarities of construction are not controlling. As was stated in *Kinloch Tel. Co. v. Western Electric Co.*, 113 Fed. 652, 5 C. C. A. 362:

“‘The similarities and differences of machines and combinations are to be determined by the offices or functions which they perform, by the principles on which they are constructed, and by the modes which are used in their operation. A device which is constructed on the same principle, which has the same mode of operation, and which accomplished the same result as another by the same or by equivalent mechanical means, is the same device, and a claim in a patent of one such device claims and secures the other.’ Citing *Machine Co. v. Murphy*, 97 U. S. 120, 125, 24 L. Ed. 935.”

The Supreme Court of the United States has repeatedly held that a charge of infringement may be made out though the letter of the claims is avoided.

Machine Co. v. Murphy, 97 U. S. 120;

Ives v. Hamilton, 92 U. S. 426-431;

Morey v. Lockwood, 8 Wall. 230;

Elizabeth v. Pavement Co., 97 U. S. 126-137;

Sessions v. Romadaka, 145 U. S. 29;

Hoyt v. Horne, 145 U. S. 302.

A patent is to be construed to cover the novelty of the invention disclosed thereby, as said by the Circuit Court of Appeals for the Sixth Circuit, in *Vrooman v. Penhollow* (179 Fed. 297-9):

“According to the advance it has made in novelty and utility beyond the former art.”

It does not require a broad and generic construction upon the claims of the patent in suit to hold defendants' machines as infringements. On the contrary such machines can escape the charge of infringement only upon the most narrow and strict interpretation of such claims and the limitation thereof to the precise constructions shown and described. If the doctrine of equivalency is applied even with slight liberality the combinations of these respective claims are readily found in defendants' machines.

For these reasons appellant prays that the decree be reversed and appellees enjoined from further appropriating the inventive idea of Robert Strain as thus expressed in the patent in suit.

FREDERICK S. LYON,

Solicitor for Appellant.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,
Plaintiff in Error,
vs.
FRANK STARR,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Western District of Washington, Northern Division.

FILED
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No. 2242

United States

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*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,

Defendant.

Names and Addresses of Counsel.

E. S. PILLSBURY, Esq., Attorney for Defendant
and Plaintiff in Error,
San Francisco, California.

H. D. PILLSBURY, Esq., Attorney for Defendant
and Plaintiff in Error,
San Francisco, California.

E. C. HUGHES, Esq., Attorney for Defendant and
Plaintiff in Error,
661 Colman Building, Seattle, Washington.

MAURICE McMICKEN, Esq., Attorney for De-
fendant and Plaintiff in Error.
661 Colman Building, Seattle, Washington.

WM. T. DOVELL, Esq., Attorney for Defendant
and Plaintiff in Error,
661 Colman Building, Seattle, Washington.

H. J. RAMSEY, Esq., Attorney for Defendant and
Plaintiff in Error,
661 Colman Building, Seattle, Washington.

C. A. REYNOLDS, Esq., Attorney for Plaintiff and
Defendant in Error,

530 Pioneer Building, Seattle, Washington.

HARRY BALLINGER, Esq., Attorney for Plaintiff
and Defendant in Error,

530 Pioneer Building, Seattle, Washington.

CHARLES T. HUTSON, Esq., Attorney for Plain-
tiff and Defendant in Error,

530 Pioneer Building, Seattle, Washington.

[1*]

*In the Superior Court of the State of Washington, in
and for the County of King.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH
COMPANY, a Corporation,

Defendant.

Complaint.

Plaintiff complaining of defendant alleges:

I.

That at all times herein mentioned defendant was
and it still is a corporation duly organized and ex-
isting under and by virtue of the laws of the State
of California, and doing business and having an
office for the transaction of business, and agents
upon whom service of Summons may lawfully be
made, in Seattle, King County, Washington.

*Page-number appearing at foot of page of original certified Record.

II.

That plaintiff, Frank Starr, on, to wit, September 15, 1911, and for a long time prior thereto, was in the employ of defendant in said city of Seattle, as an installer, and was engaged in stringing wires and cables of the defendant company under the direction of a foreman employed by defendant, and in his said work plaintiff and his fellow-workmen had occasion, from time to time, to use ladders, and that defendant undertook to furnish to plaintiff and his fellow-workmen such ladders and other instrumentalities as were needed by them in their said work.

III.

That on September 15, 1911, the gang, of which plaintiff was a member, under the direction of said foreman, was engaged in putting up a cable on the wall of a building abutting on Post Street, in the city of Seattle, between Pike and Union Streets, in said city; that certain ladders had been furnished for said gang of men by the defendant for their use and plaintiff had nothing to do with the furnishing of said ladders; that said cable was being fastened to said wall [2] at a height of approximately 25 or 30 feet above the surface of said Post Street, and said ladders being separately too short to reach to said point, the same, by the direction of said foreman, were spliced together and plaintiff, in the discharge of the duties of his employment, went upon said ladders to fasten said cable; that because of the shortness of said ladders it was necessary for plaintiff to take his position and he did take his position upon the top rung of the uppermost of said

ladders; that the topmost of said ladders was defective in this, that the top rung thereof was cross-grained so that the same was weak and unfit for use, the same being too weak to hold the weight of a man standing upon it; that defendant and said foreman, by a reasonable inspection of said ladder, could have ascertained the condition of said rung, and it would have been apparent upon said inspection that the same was dangerous and unfit for use and would be likely to break if anyone took up a position on said rung, but neither said foreman nor other agent of defendant made such inspection; and that plaintiff did not know said rung was defective, weak or insufficient and was not warned thereof, and supposed that the rung was sufficient for his use in the performance of his work. That when plaintiff in the performance of his duties as aforesaid went upon said ladder and stood upon said rung, as his duties required him to do, the same broke, and plaintiff therefrom fell a distance of about 20 feet to the surface of said Post Street which was paved, and thereby received the injuries hereinafter set forth; that said accident was wholly due to the negligence of defendant in furnishing to plaintiff for use in the performance of his duties, said unsafe ladder and in failing to inspect the same, and in failing to warn him of his danger in using the same, and was not due to any carelessness or negligence on the part of plaintiff.

IV.

That by being so thrown to the surface of said Post Street, plaintiff received the following injuries,

namely: He sustained a fracture of the base of his skull and a fracture of the bone of his right heel; he suffered concussion of the brain and therefrom was unconscious [3] for a period of several hours and thereafter was only semi-conscious for several days; from said injuries to his head he has been rendered almost totally deaf in his left ear; his nervous system received a great and severe shock, and all and singular the said injuries are permanent; that from his said injuries he has suffered great pain and has been confined to a hospital up to this time; that at the time of the said accident plaintiff was a healthy man, of the age of 24 years; that he was constantly employed at wages of approximately \$100 per month; that by reason of said injuries he has been unable to work to this day, to his loss in wages in the sum of \$50, and he will be unable to work for a long time in the future; that he has necessarily incurred expenses for hospital services on account of said injuries in the sum of \$22.50, and for medical services and attention in the treatment of said injuries in the sum of \$25.00, and he will be compelled to incur further expense for hospital and doctor's services in the future; that in addition to said special items of damage plaintiff has been damaged by reason of said injuries in the sum of \$20,000.

WHEREFORE plaintiff prays judgment against defendant in the sum of \$20,097.00, together with the costs and disbursements of this action.

REYNOLDS, BALLINGER & HUTSON,

Attorneys for Plaintiff. [4]

State of Washington,

County of King,—ss.

Frank Starr, being first duly sworn, on oath says:
That he is the plaintiff in the above-entitled action;
that he has read the foregoing complaint, knows the
contents thereof and believes the same to be true.

FRANK STARR.

Subscribed and sworn to before me this 28th day
of September, 1911.

H. BALLINGER,

Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within Petition for Removal received and
due service of same acknowledged this 10th day of
October, 1911.

REYNOLDS, BALLINGER & HUTSON,

Attorneys for Plaintiff.

Filed Oct. 10, 1911. D. K. Sickels, Clerk.

Filed U. S. Circuit Court, Western District of
Washington. Nov. 7, 1911. James C. Drake, Clerk.
B. O. Wright, Deputy. [5]

*In the Superior Court of the State of Washington in
and for King County.*

No. 83,409.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH
COMPANY, a Corporation,

Defendant.

Order of Removal.

This cause coming on duly and regularly for hearing on the regular call of the motion calendar, pursuant to due notice to said plaintiff herein, upon the application of said defendant, The Pacific Telephone and Telegraph Company, for an order transferring this cause to the Circuit Court of the United States for the Western District of Washington, Northern Division; and it appearing to the Court that on the 10th day of October, 1911, the said defendant duly filed and presented to this Court its petition for such removal, in due form of law, and also its bond therefor, duly conditioned, with good and sufficient surety, as provided by law, which bond was on said 10th day of October, 1911, by this Court duly approved, and it appearing to the Court that *this* a proper cause for removal to said Circuit Court;

Now, therefore, it is hereby ordered and adjudged that this cause be and hereby is removed to the Circuit Court of the United States for the Western District of Washington, Northern Division, and the Clerk of this Court is hereby directed to make up and transmit to the said United States Circuit Court a true copy of the record herein.

Dated: October 14, 1911.

MITCHELL GILLIAM,

Judge.

Filed Oct. 14, 1911. D. K. Sickels, Clerk. [6]

Filed U. S. Circuit Court, Western District of Washington, Nov. 7, 1911. James C. Drake, Clerk. B. O. Wright, Deputy. [7]

*In the Circuit Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,

Defendant.

Answer.

Comes now the defendant and for answer to the complaint of plaintiff heretofore filed herein admits, alleges and denies as follows:

I.

For answer to paragraph II, this defendant admits that Frank Starr was on the said 15th day of September, 1911, and for a long time prior thereto, in the employ of said defendant in said city of Seattle, but denies each and every other allegation in said paragraph II contained.

II.

For answer to paragraph III, this defendant denies each and every allegation therein contained.

III.

For answer to paragraph IV, this defendant denies each and every allegation therein contained, and especially denies that said plaintiff has been damaged in the sum of Twenty Thousand Dollars (\$20,000.00), or any other sum, or at all.

And for another and first affirmative defense, this

defendant alleges:

I.

That any risk or peril attending the work in which the said Frank Starr was engaged at the time of the happening of [8] the accident described in the complaint was open and apparent and well known to the said Frank Starr and assumed by him.

And for another and second affirmative defense this defendant alleges:

I.

That the injuries, if any, received by the said Frank Starr were caused and contributed to by his own careless and negligent acts, and by the careless and negligent acts of his fellow-servants.

Wherefore, this defendant prays that it may go hence with its costs.

HUGHES, McMICKEN, DOVELL & RAM-
SEY,

Attorneys for Defendant.

State of Washington,
County of King,—ss.

Willis Brindley, being first duly sworn, on oath deposes and says: That he is the commercial manager of The Pacific Telephone and Telegraph Company, the defendant herein; and that he makes this verification on its behalf; that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

WILLIS BRINDLEY.

Subscribed and sworn to before me this 7th day of November, A. D. 1911.

[Seal]

H. A. OWEN, Jr.,

Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within answer received and due service of same acknowledged this 7th day of Nov., 1911.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff. [9]

[Indorsed]: Answer. Filed U. S. Circuit Court, Western District of Washington. Nov. 7, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.
[10]

*In the Circuit Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,

Defendant.

Reply.

Comes now plaintiff and by way of Reply to the First Affirmative Defense set forth in the Answer of defendant in this cause served, denies each and every, all and singular, the allegations and averments in said first affirmative defense contained.

II.

And by way of Reply to the Second Affirmative Defense in said Answer set forth, plaintiff denies each and every, all and singular, the allegations and averments in said Second Affirmative Defense set forth.

Wherefore plaintiff prays judgment according to the demand of his complaint.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

C. A. Reynolds, being first duly sworn, on oath states: That he is one of the attorneys for the above-named plaintiff; that he has read the foregoing Reply, knows the contents thereof and believes the same to be true; that he makes this verification because plaintiff is absent from King County, Washington.

C. A. REYNOLDS. [11]

Subscribed and sworn to before me this 14th day of November, 1911.

[Seal] H. BALLINGER,
Notary Public in and for the State of Washington,
Residing at Seattle, in said State.

Copy of within Reply received and due service acknowledged this 14th day of Nov., 1911.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Defendant.

[Indorsed]: Reply. Filed U. S. Circuit Court,
Western District of Washington, Nov. 21, 1911.

James C. Drake, Clerk. B. O. Wright, Deputy.
[12]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH
COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and assess his damages at Eight Thousand (\$8,000.00) Dollars.

F. W. VAN ALLEN,

Foreman.

[Indorsed]: Verdict. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 10, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy. [13]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

PACIFIC TELEPHONE & TELEGRAPH COM-
PANY, a Corporation,

Defendant.

Judgment.

BE IT REMEMBERED that this cause came duly on for hearing on the 8th day of October, 1912, plaintiff appeared in person and by Reynolds, Ballinger & Hutson, his attorneys; defendant appeared by Hughes, McMicken, Dovell & Ramsey, its attorneys. Thereupon a jury of twelve good and lawful men of the district was duly impaneled and sworn, and thereafter the evidence of the respective parties was introduced, and after argument of the cause by attorneys on either side the Court duly charged the jury upon the law of the case and the jury retired in charge of a sworn bailiff to consider of its verdict; having duly considered the same said jury, on, to wit, the 10th day of October, 1912, brought into court its verdict, wherein and whereby it did find in favor of the plaintiff and against the defendant, and did assess plaintiff's damages in the sum of Eight Thousand (\$8,000) Dollars, and now, upon motion of the

attorneys for plaintiff for judgment upon said verdict, it is hereby

CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that plaintiff do have and recover of and from the defendant said sum of \$8,000, together with the costs and disbursements of this action to be taxed; for all of which let execution issue. [14]

Done in open court this 19th day of October, 1912.

CLINTON W. HOWARD,

Judge.

[Indorsed]: Judgment. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 19, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy. [15]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

Memorandum of Costs and Disbursements.

	Amount Claimed.	Amount Allowed.
Clerk of Court—to be taxed.....		\$13.90
Attorney's fees	\$20.00	20.00
Reporters' fees	7.50	7.50
Feeding jury	7.00	7.00
Witness fees:		
R. D. McMillan, Tacoma, Wn.		
1 day, 72 miles.....	\$6.60	
U. C. Bates, 1 day, 2 miles....	3.10	
A. W. Hawley, 1 day, 2 miles..	3.10	
	<hr/>	
Total.....	12.80	12.80
		<hr/>
Total.....		61.20

Taxed Oct. 18, 1912.

FRANK L. CROSBY,

Clerk.

By F. A. Simpkins,

Deputy.

United States of America,
Western District of Washington,—ss.

H. Ballinger, being first duly sworn, deposes and says: That he is one of the attorneys for the above-named plaintiff in the above-entitled cause, and as such has knowledge of the facts herein set forth; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in [16] the said cause, and

that the services charged herein have been actually and necessarily performed as herein stated.

[Seal]

H. BALLINGER.

Subscribed and sworn to before me this 15th day of October, 1912.

CHARLES F. HUTSON,
Notary Public in and for the State of Washington,
Residing at Seattle in Said State. [17]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

PACIFIC TELEPHONE & TELEGRAPH CO.,
a Corporation,

Defendant.

[Notice of Application for Taxation of Costs, etc.]

To the Pacific Telephone & Telegraph Company, a Corporation, and to Messrs. Hughes, McMicken, Dovell & Ramsey, Its Attorneys:

You will please take notice that on Thursday, the 17th day of October, 1912, at the hour of two o'clock P. M., application will be made to the Clerk of said Court to have the within memorandum of costs and disbursements taxed, pursuant to the rule of said court in such cases made and provided.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff.

Due service of the within and foregoing memorandum of costs and disbursements and notice of the taxation thereof by the receipt of a true copy thereof hereby is admitted in behalf of parties entitled to such service by the rules of court, this 15th day of October, 1912.

HUGHES, McMICKEN, DOVELL & RAMSEY.

[Endorsed]: Memorandum of Costs and Disbursements. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 15. 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy. [18]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH
COMPANY, a Corporation,

Defendant.

Motion to Set Aside Verdict and for New Trial.

Comes now the defendant and moves the Court to set aside the verdict rendered on the 10th day of October, 1912, and to grant a new trial for the following reasons:

I.

Irregularity in the proceedings of the court by

which the losing party was prevented from having a fair trial.

II.

Excessive damages appearing to have been given under the influence of passion or prejudice.

III.

Insufficiency of the evidence to justify the verdict, in this—the evidence is insufficient to establish any negligence on the part of the defendant, the appliance, to wit, the ladder, the defective condition of which it is claimed caused the accident, was not shown by the evidence to have been furnished by the defendant, as is alleged in the complaint, or at all, but upon the contrary was secured by the plaintiff and his fellow-servants; the evidence is insufficient to establish that there was any latent or hidden defect in the said ladder or any defect which the plaintiff by the exercise of ordinary care would not have observed and understood.

IV.

Error in law occurring at the trial in this, to wit:
[19]

The Court erred in not holding as a matter of law that the plaintiff was guilty of contributory negligence; the Court erred in not holding as a matter of law that the plaintiff assumed any risk or peril attending the use of the appliance which caused the injury; the Court erred in refusing to grant the motion of defendant for nonsuit, and directed verdict at the close of plaintiff's evidence; the Court erred in refusing to sustain the challenge of defendant to the sufficiency of the evidence and to grant a motion for a

directed verdict at the close of all the evidence.

HUGHES, McMICKEN, DOVELL & RAM-
SEY,

Attorneys for Defendant.

Copy of within Motion received and due service of
same acknowledged this 24th day of October, 1912.

REYNOLDS, BALLINGER & HUTSON.

[Endorsed]: Motion for New Trial. Filed in the
U. S. District Court, Western Dist. of Washington.
Oct. 24, 1912. Frank L. Crosby, Clerk. By F. A.
Simpkins, Deputy. [20]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH
COMPANY, a Corporation,

Defendant.

Order Overruling Petition for New Trial.

This cause came duly on for hearing upon the peti-
tion of defendant for a new trial in the above-entitled
cause, on the 2d day of December, 1912, the parties
appearing by their respective attorneys. After hear-
ing said petition, the Court being duly advised in the
premises, it is hereby

CONSIDERED, ORDERED AND ADJUDGED by the Court that said petition be, and the same hereby is, overruled, to which defendant excepts and its exception is allowed.

Done in open court this 13th day of December, 1912.

CLINTON W. HOWARD,
Judge.

[Endorsed]: Order Overruling Petition for New Trial. Filed in the U. S. District Court, Western Dist. of Washington. Dec. 13, 1912. Frank L. Crosby, Clerk. By E. M. L., Deputy. [21]

[Bill of Exceptions.]

*In the Circuit Court of the United States, Western
District of Washington, Northern Division.*

No. —.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH
COMPANY,

Defendant.

BE IT REMEMBERED that heretofore and on, to wit, October the 8th, 1912, the above-entitled cause came regularly on for trial in the above court, and before the Honorable Clinton Howard, Judge of said court, sitting with a jury.

The plaintiff appearing by Harry Ballinger, Esq. (of Messrs. Reynolds, Ballinger and Hutson);

The defendant appearing by W. T. Dovell, Esq. (of Messrs. Hughes, McMicken and Ramsey).

And thereupon the following proceedings were had and done, to wit: [22*—1†]

[Testimony.]

TUESDAY MORNING SESSION.

October 8, 1912, 10 o'clock.

The jury having been first duly empaneled and sworn, at the close of the opening statement by counsel for plaintiff, the plaintiff, to maintain the issues on his part to be maintained, introduced and offered in evidence the following testimony, to wit:

[Testimony of George E. Smith, for Plaintiff.]

GEORGE E. SMITH, having been first duly sworn, testified as follows on behalf of the plaintiff:

Direct Examination.

(By Mr. BALLINGER.)

Q. What is your name? A. George E. Smith.

Q. Where do you reside? A. Portland, Ore.

Q. You were brought here by the defendant in this case, by the telephone company? A. Yes.

Q. What is your occupation? A. Foreman.

Q. Of what? A. Of Cable.

Q. In whose employ?

A. Pacific Telephone and Telegraph Co.

Q. That is the defendant in this case?

A. Yes, sir. [24—3]

Q. Where are you now stationed, in Portland?

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number of Testimony as same appears in Certified Transcript of Record.

(Testimony of George E. Smith.)

A. Yes, sir.

Q. How long have you worked for the Telephone Co.?

A. About 15 years.

Q. Did you work for them in the city of Seattle?

A. Yes, sir.

Q. During what years?

A. I worked for them in Seattle from 1904, to March, of the present year.

Q. Do you know Frank Starr the plaintiff in the case?

A. Yes, sir.

Q. Did he ever work under your supervision?

A. Yes, sir.

Q. During what period?

A. Why, I believe he came to work for me in about January or February, 1907.

Q. Did he work for you then continuously, or for the defendant under your direction, until the time of his accident?

A. Very near, he lost some time.

Q. Now, by whom were the ladders supplied for the use of the construction men, whose business was it?

A. The majority of them were supplied by the Telephone Co.

Q. How were they supplied, through whom? Through you or to the men individually?

A. Well, as a general thing, I got the ladders, that is when they were telephone ladders.

Q. Was it always possible to get a sufficient number of ladders from the Telephone Co.?

A. No, sir.

Q. In that emergency what were you accustomed to do? [25—4]

(Testimony of George E. Smith.)

A. If I was right around there, I always told them to go borrow them, go get them.

Q. How many men can use a single ladder in the work which you were superintending?

A. Sometimes there is only one man, but when we are out in the street that way, around buildings, there is always two.

Q. It would require at least one ladder then for each two men engaged in the work? A. Yes, sir.

Q. And as I understand you, you were not always able to get so many from the telephone company?

A. Yes, sir.

Q. What kind of work was Frank Starr doing in Sept., 1911?

A. He was putting cable on buildings.

Q. Do you know where Post St. is in this city?

A. Yes, sir.

Q. Where is it?

A. It is between Western Avenue and First Avenue.

Q. And between what intersecting streets, according to your best recollection?

A. It runs from the railroad to Western.

Q. It is a north and south street, isn't it?

A. Yes, sir; it runs the same as the avenue, as First and Second Avenue.

Q. And how wide is Post St.?

A. It is about 40 feet.

Q. Paved or unpaved?

A. Paved, most of the way.

Q. Now, at the time and place of the plaintiff's ac-

(Testimony of George E. Smith.)

cident, which I will call for in a moment, was the street paved? [26—5] A. Yes, sir.

Q. Where was this place of accident located?

A. It was between Pike and Union on Post.

Q. What was the slope of the ground on Post St., at that place?

A. Well, I don't know just what the grade is there.

Q. Is there any slope?

A. Yes, sir, it is quite a steep grade.

Q. Is it lower towards the south of Union St., or higher? A. It is lower towards Union St.

Q. Then the grade is downward from Pike southward? A. Yes, sir.

Q. What was the character of the pavement, as you recall it? A. It is sandstone.

Q. On the 15th day of Sept., 1911, how many men were working in your gang at that place? A. Six.

Q. And how long had they been working in that vicinity, I mean in the immediate vicinity, say within a block? A. The same men?

Q. Yes.

A. Well, some of them had been there for almost a week, and then others had been added.

Q. The personnel of the gang would change from time to time? A. Yes, sir.

Q. I think it is a fact that you had several under your control, did you not? A. Yes, sir.

Q. This particular gang, though, some of them had been there nearly a week? [27—6] A. Yes, sir.

Q. And some had been added within the week?

A. Yes, sir, and some taken away.

(Testimony of George E. Smith.)

Q. But had the gang been kept at about that number, about six? A. Yes, sir.

Q. Was Mr. Starr in that gang? A. Yes, sir.

Q. Do you recall how long he had been on the job in that particular vicinity?

A. Well, I think he had been there four days; I believe that was his fourth day.

Q. Did that gang have any company ladders, or ladders supplied directly by the company?

A. Yes, sir.

Q. How many? A. One.

Q. Do you recall the ladder that is involved in this lawsuit? A. Yes, sir.

Q. There were two pieces of it, were there not?

A. Yes, there were two pieces?

Q. Do you know where the top piece came from?

A. Yes, sir.

Q. Where did it come from?

A. Why, one of the workmen borrowed it.

Q. Which workman? A. Mr. Filer.

Q. How long before the morning of the 15th day of Sept. was it that he borrowed it?

A. Why, I believe he borrowed it a couple of days before, about [28—7] two days before.

Q. In what work was Mr. Filer engaged during the time that elapsed between the time he borrowed the ladder and the time of the accident?

A. He was rewiring and putting up little terminal boxes, going to connect wires to the cable.

Q. How high were they from the ground?

A. About seven feet—seven or eight feet.

(Testimony of George E. Smith.)

Q. How long was this ladder, do you recall?

A. I should judge about six feet.

Q. What was the color of it and its appearance?

A. It is weather-beaten.

Q. Was it rough or smooth?

A. Why, I believe the sides were kind of dressed. I think the sides were dressed, and the boards, the cross-pieces were rough.

Q. That is the rounds? A. Yes, sir.

Q. What is your best recollection as to the material of which the rounds were made?

A. Do you mean all of the rounds?

Q. Well, of that upper piece of ladder, were they fir or hard wood?

A. It was fir, the whole ladder was fir.

Q. In your business, you have had occasion for many years to use ladders? A. Yes, sir.

Q. I will ask you to state whether or not cross-grained sticks are usually used for rounds of ladders.

A. No, sir, they are not. [29—8]

Q. Would you say that their use is very seldom?

A. Yes, sir.

Q. There was another short ladder in use there before the accident, was there not? A. Yes, sir.

Q. What was that like?

A. Why, that was about 12 feet, I should judge.

Q. And do you know who borrowed that?

A. McCartney.

Q. He was another of the men on the work?

A. Yes, sir.

Q. Now, I will ask you to state whether or not you

(Testimony of George E. Smith.)

made any application to the defendant for some ladders for that work recently before the accident.

A. I did.

Q. When was the last application you made?

A. The day before it happened.

Q. With what result?

A. I was unable to get them.

Q. Now, were you at the place of the accident substantially every day? A. Yes, sir.

Q. Or more than once? A. Yes, sir.

Q. Did you see these two ladders in use during the time that they were on the job, and before the accident? A. Yes, sir.

Q. What, if any, conversation did you have with the men of that gang about ladders the day before the accident? A. Well, they wanted me— [30—9]

Mr. DOVELL.—I object to that as not material, unless it is connected with the plaintiff here, probably what he told the plaintiff would be material.

By the COURT.—Objection sustained, exception allowed.

Q. In the presence of the plaintiff, in the presence of Mr. Starr?

A. I don't quite get what you mean.

Q. State whether or not the day before the accident you had a conversation with the men in the gang in the presence of Mr. Starr, concerning ladders?

A. Yes, sir.

Q. What time in the day was that?

A. Why, if I remember correctly, it was right after lunchtime, possibly between two and three.

(Testimony of George E. Smith.)

Q. What was that conversation?

A. They wanted a longer ladder to get up there, to get up to where the cable was. It was possibly about 20 or 25 feet from the ground, and we only had one ladder that would reach up there.

Q. That was the long ladder you have already mentioned?

A. Yes, sir. So I told them to splice them two ladders together and use them. I don't know as I said two ladders. I said, "Splice them ladders together and use them."

Q. There was just these other two short ladders on the ground besides this long ladder? A. Yes, sir.

Q. Now, did you observe that there was any cross-grained round in the shorter of these two ladders?

A. No, sir.

Q. Was the fact that it was cross-grained apparent to just an [31—10] ordinary observation, such as one gives to a ladder in using it?

A. I didn't quite understand how you got that.

Q. You saw the ladders in use and saw them on the ground? A. Yes, sir.

Q. Was this cross-grained condition apparent to you, was it apparent to you? A. No, sir.

Q. Would it be apparent to an ordinary look, if one would look at the ladder, would it be apparent to him, I mean without a special inspection of the round? A. No, I don't think it would.

Q. Did you make any inspection of either of these ladders? A. No, sir.

Q. Was there anyone else in direct charge of these

(Testimony of George E. Smith.)

men or of the appliances that they were using besides yourself? A. No, sir.

Q. What was the condition of Mr. Starr's health—what was his physical condition before the 15th day of Sept., 1911?

A. Well, he never lost any time, never was sick that I know of.

Q. Did he appear to be a healthy man?

A. Yes, sir.

Q. Strong? A. Yes, sir.

Q. Was he a good worker?

A. I considered him such.

Q. What wages was he being paid?

A. \$3.75 a day. [32—11]

Q. What was the nature of the work the men were doing at the time of the accident and prior thereto—you spoke of stringing cables. Just describe that.

A. Do you mean was it heavy or light work?

Q. What were they doing, what is a cable?

A. Well, a cable, this particular cable we were stringing had a one hundred and one pair of wires in it—that is, very often copper wire insulated with paper, around them is wrapped some paper, a lead sheet, which will go possibly about three-quarters of a pound to a foot.

Q. Now, on the end of this particular cable, was there any sleeve or anything of that sort?

A. No, sir, we were splicing to put on what we call a sleeve; there was to be a splice.

Q. There was a splicing on it?

A. There was to be one put on.

(Testimony of George E. Smith.)

Q. Do you recall that there was not a rather larger sleeve, about one foot long on the end of it, a soldered end? A. I couldn't say about that.

Q. Such ends were used on cable, were they not?

A. Sometimes they are on there.

Q. What would such an end weigh—it would weigh a little more, would it not?

A. Yes, a little more, but when the copper wire would be out, it would be just about the same.

Q. Now, you say they were stringing cable on Post St. On which side of the street were they stringing it? A. On the east side.

Q. To what supports were they stringing it?

A. Well, we had to drill holes in the brick and then put in [33—12] a lead sheet, and put a clamp on to that.

Q. I gather, then, it was being supported by the walls of the building abutting on the street?

A. Yes, sir.

Q. How far apart were these supports placed?

A. 18 inches.

Q. Now, in putting them up, did you have any more than the permanent installation, or was it just put up temporarily? A. Put up temporarily first.

Q. In what manner was that being done?

A. We would drive a nail in the mortaring of the brick, and then put a piece of wire through the cable so it would slide through as we worked our slack through, slide through this kind of running loop.

Q. It would be supported in that way until another gang, or the same gang subsequently, would come

(Testimony of George E. Smith.)

along, and clamp it permanently into the building?

A. Yes, sir.

Q. It was just temporary work was being done at that time, wasn't it?

A. No, Mr. Starr was doing the temporary work, and the other two were coming along, following up, doing the permanent work.

Q. Was this being strung from the north or from the south? A. From the north.

Q. I understood you to say that Post St., at that place sloped toward the south, so that toward the south was lower than toward the north?

A. Yes, sir.

Q. Was the cable being kept at about a horizontal position [34—13] or did it follow the slope of the street? A. No, sir; kept level.

Q. Then, I understand you that the cable, as it was being installed further on, further south, would be higher and higher above the level of Post St.?

A. Yes, sir.

Q. And at this particular place it was perhaps 25 feet above Post St.? A. Yes, sir.

Q. You were not present at the moment of the accident, I think? A. No, sir.

Q. How long afterwards did you see Mr. Starr?

A. About twenty or twenty-five minutes.

Q. Where was he then?

A. He was in the hospital.

Q. What appeared to be his condition as to being conscious or unconscious?

A. Well, he could—he felt dazed, and just kind of

(Testimony of George E. Smith.)

said a word and then he would go to sleep like, so I didn't say very much to him. I thought I had better let him rest.

Cross-examination.

(By Mr. DOVELL.)

Q. How many ladders, or pieces of ladders, how many parts of ladders were there on this job altogether? A. There were five.

Q. Five pieces of ladder? A. Yes, sir.

Q. How many men were working on the job?
[35—14] A. There were six.

Q. How much territory did it cover?

A. One block.

Q. You had general charge of that?

A. Yes, sir.

Q. Did you have any other work under your supervision at that time? A. Yes, sir.

Q. Where?

A. Why, I had some work going on in the Hoge Building, and I had it, you might say, all over the city, that is, different places. I don't remember just where the men were working that day.

Q. How many men did you have under you that day, how many men altogether? A. Why—

Q. About how many? A. Between 20 and 25.

Q. Now, those men were scattered, as I understand, all over the city? A. Yes, sir.

Q. You, of course, didn't spend any great length of time at any one place?

A. Why, it depended on the class of work the men were doing.

(Testimony of George E. Smith.)

Q. How much time did you spend at this job on Post St.?

A. Well, along there. I used to go along there possibly four or five times a day.

Q. Just passed by there and observed the work and gave what directions you thought necessary and go on to some other place? [36—15] A. Yes, sir.

Q. You didn't linger there and take a hand in the work? That is what I am getting at.

A. Like in putting the cable up, whenever they were stringing a cable I was always right there.

Q. They had five pieces of ladder. Where did they get all those five pieces?

A. Well, two pieces belonged to the telephone company, that was, could be made into two pieces, or one ladder.

Q. An extension ladder of two pieces?

A. Yes, sir.

And two pieces were borrowed and one was made up out of some two-by-four's and some boards.

Q. Now, somebody told you they needed a ladder to get up about 18 to 20 feet from the ground, it was necessary to get that high, was it? A. Yes, sir.

Q. Somebody told you they needed a ladder. Do I understand you correctly? A. Yes, sir.

Q. And they told you they had none of sufficient length; is that correct? A. Yes, sir.

Q. Now, then, you told them to splice some of their short ones together; is that right?

A. I didn't say "nail them," I said, "Splice your ladders together."

(Testimony of George E. Smith.)

Q. Now, did you point out the particular ladders they were to splice together, or did you just say, "Splice two of your short ones together"? [37—16]

A. Well, there were only just the two short ones that were there, that they did splice together.

Q. Did you examine them, did you pick out these two short pieces, or did you just say, "Splice two short ones together"?

A. Well, I didn't pick them out for them.

Q. Did you examine either of them? A. No.

Q. Who were those men that you told to splice two short ladders together?

A. McCartney and Starr.

Q. Told McCartney and Starr to splice two short ladders together? A. Yes, sir.

Q. Then you went off and left them, did you?

A. That was along in the afternoon. I was back again before quitting time at night.

Q. In the meantime Starr had been hurt?

A. No, sir, he wasn't hurt until the next morning.

Q. He used the ladder then that afternoon?

A. Yes, sir.

Q. After he had spliced it? A. Yes, sir.

Q. Starr used it, did he?

A. Starr wasn't on it when I came there, when I came round.

Q. Who was?

A. I think McMellon was on it when I came round.

Q. Did you ever see Starr on it at all?

A. No, sir.

Q. Did you see Starr splicing it? [38—17]

(Testimony of George E. Smith.)

A. Yes, sir.

Q. You saw him start to splice it before you left?

A. Yes, sir.

Redirect Examination.

(By Mr. BALLINGER.)

Q. I understand you that two of the pieces of ladder that you referred to were the two pieces of the company ladder? A. Yes, sir.

Q. That was an extension ladder?

A. Yes, sir.

Q. And was in pieces, that is, they could be separated? A. Yes, sir.

Q. Now, were they being used as one ladder on that job? A. On that job; yes, sir.

Q. Would either piece of it, separately, be sufficient to do the work of the height that that cable was being put up? A. No, sir.

Q. Now, two of the other pieces were the ones you have already testified to, as having been borrowed by McCartney and Filer? A. Yes, sir.

Q. What was this other one?

A. The other one was the one Filer was using.

Q. He was using that? A. Yes, sir.

Q. When these other people spoke about wanting another ladder, you referred to what ones when you told them?

A. Why, the ones that they spliced together.

[39—18]

Q. Those were the ones you referred to?

A. Yes, sir.

Q. Told them to splice them together and go up

(Testimony of Thos. McCartney.)

on them? A. Yes.

Witness excused. [40—19]

[**Testimony of Thos. McCartney, for Plaintiff.**]

THOS. McCARTNEY, having been first duly sworn, testified as follows on behalf of the *defendant*:

Direct Examination.

(By Mr. BALLINGER.)

Q. What is your name? A. Thos. McCartney.

Q. Where do you reside? A. In Seattle.

Q. How long have you lived in Seattle?

A. About four years.

Q. And what is your occupation?

A. Journeyman lineman.

Q. For whom are you working now?

A. With the Seattle Electric Co.

Q. The Seattle Electric Co.? A. Yes, sir.

Q. Have you ever worked for the defendant, The Pacific Telephone and Telegraph Co.?

A. Yes, sir.

Q. When did you work for them?

A. I started out about 1910, or the last part of 1909, and worked until the present year, the present first of this year.

Q. Worked until the first of 1912?

A. Yes, sir.

Q. Who was your foreman?

A. Mr. Smith was my foreman.

Q. The gentleman who has just left the stand?

[41—20] A. Yes, sir.

(Testimony of Thos. McCartney.)

Q. Your work was in connection with the installation of cables and wires? A. Yes, sir.

Q. Did you know Mr. Starr during that period?

A. Yes, sir. Part of the time. Not all of the time. Maybe two and a half years.

Q. What was his business?

A. He was a journeyman lineman.

Q. Was he working in your gang during any portion of that time? A. Yes, sir.

Q. Was he so working on the 15th day of Sept., 1911? A. Yes, sir.

Q. Were you working at the same place he was?

A. Yes, sir.

Q. Where was that place?

A. Place on Post St., between Union and Pike,—between Western Avenue and First Avenue.

Q. In what direction, what general direction, does Post Street run, northerly and southerly, or easterly and westerly? A. It runs north and south.

Q. Where were you stringing cable at that time?

A. On Post St., at the corner from Pike south.

Q. What was the slope of the ground going in a southerly direction, was the ground higher or lower?

A. Well, it was lower. I can't exactly describe the—

Q. Was the cable being strung on a level or did it follow— A. Strung on a level.

Q. How long had the gang of which you and Mr. Starr were members [42—21] been working at that place, or in that vicinity?

A. I had been there about two or three days. I

(Testimony of Thos. McCartney.)

couldn't tell exactly. But just about two or three days I had been working there.

Q. You remember where Starr was working the day or two before the accident, whether he was using ladders or not? A. No, sir.

Q. He wasn't? A. No, sir.

Q. How was he working?

A. He was working on a bolstering chair swung from the top of the building, pulley block, rope and pulley block.

Q. He was supported then from above and didn't use the ladder?

A. Not using any ladder; no, sir.

Q. How many men were working on that job other than the foreman? A. Six.

Q. Can you name them?

A. There was Mr. Filer and Mr. McMellon and Mr. Dalton, Mr. Starr and myself and Mr. Gould.

Q. Mr. Werner?

A. Mr. Werner,—Mr. Gould had left—Mr. Werner was in his place. Excuse me.

Q. How many ladders were in use in that place?

A. One. And there was one extension ladder and two short ladders.

Q. By whom was the extension ladder furnished?

A. By the company.

Q. What was the understanding as to who should provide ladders [43—22] whether the company or the men, whose business was it to provide the ladders? A. It was the company's.

Q. Now, did they always provide a sufficient num-

(Testimony of Thos. McCartney.)

ber of ladders for the use of the men?

A. Not on our jobs.

Q. Through whom were they furnished—could the men go and get them or would the foreman have to go after them?

A. The foreman would have to get an order for them if there was any gotten.

Q. Now, when, as you say, the company failed to supply a sufficient number of ladders, how were they procured?

A. Well, they used to have to rustle around the alleys and get them.

Q. By whose orders would they do that?

A. By the foreman, if he was there, and if he wasn't there, we would take that on our own responsibility, because we had to have them—

Q. For a gang of six men how many ladders would be required, if they were working above ground?

A. Three would be required.

Q. And how would a ladder be used by the two men?

A. Well, one man would wait on the other man on the ground, while the other man was working up on the ladder.

Q. One man would work on the ladder and the other stand at the foot of the ladder?

A. The one man could wait on two men working on ladders.

Q. In that case three men could use two ladders?

A. Yes, sir.

Q. Now, in the period just before the 15th day of

(Testimony of Thos. McCartney.)

Sept., 1911, [44—23] while this job was going on in this vicinity, how many company ladders had been supplied? A. One.

Q. Now, were there any other ladders used in the work at that place and time? A. Yes, sir.

Q. How many others?

A. There was one short ladder been used. I wanted a ladder to do some work and I borrowed another ladder, that made two, in preference to the extention ladder.

Q. Who borrowed the short ladder?

A. I am not sure, but I think Mr. Filer.

Q. Was it borrowed before yours or afterwards?

A. How is that?

Q. Did he borrow it, or whoever borrowed it, did he borrow it before you borrowed yours or afterwards?

A. Yes, sir, he borrowed it before I did.

Q. How long had the ladder you borrowed been on the work before Mr. Starr was hurt?

A. I am not sure, but I think a day—had been on there about a day.

Q. All of the preceding day?

A. I am not sure of that, whether it was on more than that one day or not, but I think it was just about one day.

Q. Now, the other ladder, did anybody use it?

A. The small ladder?

Q. Yes. A. Mr. Filer.

Q. What was Mr. Filer doing with it?

A. Putting up terminal boxes on the cables, where

(Testimony of Thos. McCartney.)

the cable [45-24] terminates into the boxes.

Q. About how high from the ground?

A. About 7 feet.

Q. Now, did Mr. Starr use either of those ladders before the day he got hurt?

A. I am not sure of that.

Q. You didn't see him using it?

A. Not that I know of I didn't see him.

Q. He was sitting in this bolstering chair a good part of the time? A. Yes, sir.

Q. How long had you been working about work that required the use of ladders?

A. About,—well,—we were requiring the use—I think we required ladders when we started on the job.

Q. I didn't make myself clear. How long have you worked at work where you had to use ladders—How long have you done that in your lifetime?

A. I have been using ladders for two years—about two and a half years.

Q. Is it customary to make ladders with a round that is cross-grained? A. No, sir, it isn't.

Q. Is such a ladder safe? A. No, sir.

Q. What would you say as to whether the use of cross-grained rounds is rare or not, does it happen once in many times? A. It is rare.

Q. What was the color, or the general appearance of this short ladder, was it painted or unpainted, or weather-beaten [46-25] or what?

A. It was rather of a wood color, dark color, that would naturally have been out in the rain—it would

(Testimony of Thos. McCartney.)

look dark—it was the natural color of the wood that is rough.

Q. Did you observe the rounds of this small ladder, about how large they were?

A. Well, not exactly. I just took a glance at them.

Q. About how large were they?

A. They were about two inches, two and a half inches in width. They were three quarters of an inch thick.

Q. How were they fastened to the legs of the ladder? A. They were nailed on the outside.

Q. They were not notched in, or morticed in any manner?

A. No, sir, not on the top piece. On the bottom piece they were.

Q. I mean on this small ladder?

A. The small ladder they wasn't.

Q. You saw this ladder as it was used about there from time to time? A. Yes, sir.

Q. Did you observe any cross-grained rounds in the ladder before the accident? A. No, sir.

Q. If there was any cross-grained piece there, was it so apparent that a man in the ordinary use of the ladder would see it? A. Not that I noticed.

Q. Would such a cross-grained piece be safe to go upon? A. No, sir. [47-26]

Q. Now, the piece you borrowed was about how long? A. About 12 or 14 feet.

Q. How was it constructed?

A. It was made of dressed two-by-fours, and the

(Testimony of Thos. McCartney.)

rungs were morticed into the ladder, that is, notched into the ladder so that it left them straight. When you would put the ladder up against the building, the rung would be straight up and down.

Mr. DOVELL.—What would be straight up and down?

A. The cleat would be straight up and down. They were notched in so when the ladder would be set up against the building they would be straight up and down, notched in about a half inch or so on the bottom side, so that they made a little seat there for the rung to sit on, notched right in so that they set right into the two by fours.

Q. Did you see the foreman at that place on the 14th day of Sept., 1911? A. Yes, sir.

Q. Was anything said at that time about ladders in Mr. Starr's hearing to the foreman?

A. Yes, sir.

Q. And by the foreman? A. Yes, sir.

Q. What was said?

A. We asked for some ladders to do the work. There were four of us there, hadn't only the one ladder to work on.

Q. What did Mr. Smith say?

A. He came along on the work and he says, "We want some more ladders. This ain't long enough, and this ain't enough ladders for us to work." "Well," he says, "You will have [48—27] to rusale some."

Q. That was the day before?

A. That was the day before.

(Testimony of Thos. McCartney.)

Q. Did he say anything about splicing?

A. Not the day before he didn't. The ladders was there—yes, it was the day before he said, and when we asked him, he asked us if we had ladders and we says, “No, we ain't got ladders, nothing to do the work.” “Well,” he says, “you will have to rustle.”

Q. That was the day before, the day before the accident?

A. Yes, sir, and when he said that he said, “Splice these ladders together.”

Q. When was it you had a talk with him about the splicing? A. That day, the day before.

Q. The day before what?

A. The day before the accident.

Q. What time of day was it?

A. Well, it was along about lunch time or noon, something of that kind.

Q. He told you—what did he tell you then?

A. He told us to splice the ladders together, the short ladders we had to do the work.

Q. What ladders did he refer to?

A. There wasn't only the two short ladders on the job. A. And they were at hand when he—

A. They were leaning up against the building.

Whereupon Court adjourned until Tuesday afternoon, October the 8th, 1912, 2 o'clock. [49-28]

(Testimony of Thos. McCartney.)

TUESDAY AFTERNOON SESSION.

October 8, 1912, 2 o'clock.

THOS. McCARTNEY on the stand.

Direct Examination (Continued).

(By Mr. BALLINGER.)

Q. Before recess was taken this morning you stated that on the afternoon before the morning of the 15th of Sept., 1911, the foreman was at the place of work, and in response to a request for ladders, he said to splice together the ladders you had, and there were just these two pieces which could be spliced together?

A. Yes, sir.

Q. Did you splice them? A. Yes, sir.

Q. How were they spliced, what position?

A. They were together on the sides like that (indicating).

Q. That is legs?

A. The legs were lapped about 12 or 14, maybe 16 inches, and nailed then to the other, top of the bottom piece of the ladder and then put around, 14 iron wire put around the rung to hold the ladder from giving down, so that if the notches happened to break, that the wire would hold it.

Q. Now, which piece of ladder was put on top?

A. The small piece.

Q. That is to say, the Filer ladder was put on top of what [50—29] we might call the McCartney ladder? A. Yes, sir.

Q. And nailed and lashed in place? A. Yes, sir.

Q. Who did the nailing and lashing?

(Testimony of Thos. McCartney.)

A. We both done the nailing and lashing, both Mr. Starr and I.

Q. Who did the principal part of it?

A. I don't know who done the principal part. I know I done some of it and he done some of it; we were working together.

Q. Did that splicing give way any other time after that? A. No, sir.

Q. Where were you on the morning of the 15th of Sept., 1911? A. Working right there on the job.

Q. Where was Frank Starr, the plaintiff?

A. Working with me, close to me.

Q. And who else were working on the job that morning?

A. Mr. Werner and Mr. McMellon and Mr. Dalton, Mr. Starr and myself, and I think Mr. Gould—I ain't positive, but I think Mr. Gould.

Q. Now, did an accident happen to the plaintiff, Frank Starr, on that morning? A. Yes, sir.

Q. About what time in the morning did that accident happen?

A. About half-past nine, I should think.

Q. What was the hour of going to work?

A. Eight o'clock.

Q. Did you see Frank Starr just before the accident happened, [51—30] just before it happened?

Q. Just before it happened, no, sir, I wasn't looking or noticing particularly.

Q. Where were you when the accident happened?

A. On the ladder about 12 or 15 feet north of him,

(Testimony of Thos. McCartney.)

on the same building, working on there with him.

Q. What was Mr. Starr engaged in doing at the time of the accident?

A. He was about to pull up the cable, and I could see the position he was in, they was to put up the cable on the end, up over a nail which he drove in the wall.

Q. Was the cable already supported at a place near him?

A. About 13 feet it was, the support from him.

Q. You mean that was the length of the loose end?

A. That was, the first support from where he was.

Q. About 13 feet? A. Yes, sir.

Q. Now, did this cable have a sleeve on the end of it? A. Yes, sir.

Q. What was the nature of the sleeve?

A. It was about one foot long, nearly that, and then it had been a splice, where they had spliced the cable together,—it was an old cable that had been used before, and in taking it down they sawed it in two, and then sealed the end by putting solder, pouring on solder, heating it and pouring it on, and filled the end with lead, to keep the air and moisture out of it.

Q. Would that process increase the weight of that end? A. Yes, sir.

Q. Where was this spliced ladder that you have testified to? [52—31]

A. It was standing up to the side of the building, at this point where this loose end was. He was trying to hang up—

Q. Was Starr using this ladder? A. Yes, sir.

Q. When he got up there, just before the accident,

(Testimony of Thos. McCartney.)

what was he doing?

A. He was trying to straighten it out and get it in place so we could cleat it. I was cleating on about 12 or 15 feet from the other side of him and was going along putting it on permanently. He was taking the slack out of it and trying to get it up there in place, so he could go to cleating the upright piece.

Q. In attempting to hand up that cable, just what position was he in, where was his right hand?

A. His right hand was up onto the cable in this manner, and he had a wire.

Q. We can't get that in the record without putting it in words. His right hand was up by the side of his head?

A. Holding the cable, he had, his right hand had a wire, in the other hand pulling it over a nail.

Q. Where was this wire fastened he was pulling over the nail with his left hand?

A. It was under the end of this splice—it was like a knob on the cable, just soldered on; the wire was underneath the splice so it wouldn't slip off.

Q. He was pulling up with his left hand and had his right hand under the end of the cable, lifting it up? A. Yes, sir.

Q. Now, did he have either hand free to take hold, to press [53—32] against the building, or take hold of the ladder or anything of that kind?

A. No, he had both hands occupied with the cable and wire.

Q. State whether or not the attitude which he assumed was the necessary attitude in doing work of

(Testimony of Thos. McCartney.)

that kind. A. Yes, sir.

Q. Was his body above or below the top of the ladder—that is to say, was the ladder in front of him or below him?

A. The ladder was partly in front of his leg.

Q. And how high up would the top of the ladder reach?

A. It wouldn't reach very high—about his knees, probably.

Q. About to his knees? A. Yes, sir.

Q. Was the ladder setting plumb against the wall, or was the bottom out?

A. It was out from the wall pretty much.

Q. And he was on the upper part of the ladder, so that the top of the ladder would be about to the level of his knees? A. Yes, sir.

Q. In that attitude? A. Yes, sir.

Q. Just describe the accident as it happened there at that time.

A. I heard the noise, the snap, and I turned my head around—I was standing on the ladder—I just turned the other way around, and I turned my head like that, to look over there, and when I did I saw him coming down in the air.

Q. In what position was he as he came down?

A. He was coming, when he started first, he was kind of on his feet downward, and gradually he turned over, backwards, [54—33] and kept on going backwards, and when he struck the ground he struck on his right foot, the whole—with his foot up in the air.

(Testimony of Thos. McCartney.)

Q. Which foot was up in the air?

A. The left was kind of crumpled down—his left foot was kind of crumpled under and he struck on his right like that (indicating), on his heel, and that kind of broke his fall, and then he went on over backwards and struck with his head.

Q. Where did he strike with his head?

A. Struck somewhere on the back of his head, back or side, somewhere near that.

Q. As he fell, did he fall to the right of the ladder, looking towards the east or to the left?

A. He fell towards the right of the ladder, looking towards the east.

Q. Now, did you observe which rung it was that broke?

A. Not exactly; no. I was excited and I didn't make a careful examination of it.

Q. What is your best impression about it?

A. I think it was the first or second. I don't know for sure.

Q. The top or one next to it?

A. Yes, the first or second.

Q. Where did it break, the north-end of it or south end? A. The south end of it.

Q. In what direction did it break—did it break square off or slanting?

A. It would be slanting, nearly that. I didn't get a good view of it because I was excited, like everybody is, but it looked to me like, at a glance, that it was broke slanting [55—34] ways like, across the

(Testimony of Thos. McCartney.)

rung, although it broke right off catering, and also slanting.

Q. Let's see if I get your meaning, that it slanted from the top downward to the right.

A. From the rung from where his feet was, down to the side piece.

Q. To the lower part?

A. To the side piece, practically slantways on the inside, slantways of the piece.

Q. The edges of the break, were they horizontal right across, or did it, as it were, dip?

A. One side of it was longer, a little bit longer than the other, kind of slantways through the wood.

Q. When you reached the bottom, did you go down the ladder at once to where he was?

A. I did; yes, sir.

Q. What appeared to be his condition as to being *conscious unconscious*?

A. He was unconscious.

Q. What was done with him?

A. He was carried into a building there—I don't know what the name of it is—but they carried him in there, until they could get physicians and an ambulance to take him away.

Q. Was he taken to the hospital? A. Yes, sir.

Q. To what hospital was he taken?

A. City Hospital.

Q. Did you visit him after that? A. I did.

[56—35]

Q. When?

A. I went with him from the accident, went with

(Testimony of Thos. McCartney.)

him in the ambulance to the hospital.

Q. Did his condition remain the same or did it change on the way?

A. Well, he came—he came to, but not so he would know me, or know who I was or anything like that. He didn't seem to realize anybody. He was, of course, so he could speak, but he wouldn't seem to realize.

Q. Was his speech regular and sensible or incoherent? A. It was not.

Mr. DOVELL.—Q. It was not what?

Q. Was insensible?

A. No, he was going down—he came to before they got down there in the ambulance, going, he came to at the building in the ambulance going down. I was holding his shoulder and he says to me, “Let me out of here. I am all right, I am all right—let me out of here.” I said, “No, you are hurt, Frank.” That is what I said to him, and he said, “Oh, no, I ain't hurt,” and I says, “You better lay right here and keep quiet.”

Q. Had you known Mr. Starr long before the time of this accident?

A. I had known him for about two and a half years.

Q. What appeared to be the state of his health prior to that time? A. Healthy and strong.

Q. Did you ever know him to be sick or ailing in any way? A. No, sir.

Q. What was his complexion? [57—36]

A. It was healthy, red complexion.

(Testimony of Thos. McCartney.)

Q. Did you observe whether his temperament was a happy one, or a moody one, before he was hurt?

A. I don't understand you.

Q. What kind of a man was he in regard to being pleasant and healthy, or sad?

A. He was a pleasant, good-natured man. Very good natured; always pleasant, whenever he met you. He always had a smile—was always very nice to everybody he met.

Q. Have you seen him very frequently since this accident? A. I have, frequently.

Q. And up to the present time?

A. Up to the present time.

Q. What, if any, changes have you noticed in his appearance, or his expression, or his complexion generally, what changes, if any, did you notice since the accident?

A. His changes, he seemed as if he acts like he is lost or dreaming, and he has a whole lot on his mind. He sits—

Q. Do you notice any peculiar expression on his face?

A. He sits at times, don't appear to hear anybody or see anybody, just simply sits there with his head down and he don't act like the same man. I wouldn't know he was the same man.

Q. What change, if any, have you noticed in his complexion?

A. He is pale at times, doesn't seem in good health.

Q. Have you noticed any change in his disposition, that is, whether he is less happy in disposition?

(Testimony of Thos. McCartney.)

A. I have noticed that he isn't happy.

Q. Have you noticed any particular expression on his face that you didn't see before the injury?
[58—37]

A. I do, but I can't explain that. I can't explain the expression, but I have seen the change in the expression on his face.

Q. Is the expression that he now bears such as you have observed since the accident?

A. Something like that, yes, sir. I say, at different times it shows there more than at others.

Cross-examination.

(By Mr. DOVELL.)

Q. This ladder upon which Starr was standing at the time the accident occurred was made up of two short ladders, one, I understand, about 12 feet and the other about 6 feet? A. Yes, sir.

Q. The shorter one, or the six foot ladder, spliced on top of the other one? A. Yes, sir.

Q. Now, what character of a ladder was this top one?

A. It was very rough material, not finished material.

Q. Was it a frail ladder?

A. It was a frail appearing—

Q. What were the sides of it made of?

A. I think it was made of oak; I ain't sure.

Q. What size, what dimension?

A. I should think they were two and a half inches, two or two and a half by three-quarters of an inch.

Q. About two and a half by three-quarters?

(Testimony of Thos. McCartney.)

A. Yes, that is in thickness.

Q. About three-quarters. The sides of the ladder were about [59—38] three-quarters of an inch thick? A. Yes, sir.

Q. And about two and a half inches broad?

A. Yes, and the rungs were made of something similar to the same stuff.

Q. About the same size? A. Yes, sir.

Q. Set in with a sort of a half mortice?

A. No, sir, they were nailed on the outside of the ladder.

Q. The rungs were nailed on the outside?

A. Outside of this three-quarters of an inch.

Q. Were they laid into the side pieces at all?

A. No, they weren't.

Q. Just nailed on the outside?

A. Just nailed on the outside.

Q. How many notches on each end, do you know?

A. I think there was one or two. I didn't examine them closely.

Q. It is your impression they were made of oak?

A. White; yes.

Q. Where did these two ladders, two pieces of ladder which made up this one ladder, come from?

A. I borrowed one from John Davis—I think it is John Davis, the paint-shop; they have a shop down there where they have paints.

Q. Where?

A. It is just a half a block below where we were working.

Q. You borrowed it. Did you go and ask them to

(Testimony of Thos. McCartney.)

give it to you?

A. Yes, sir, I went there and asked the gentleman if I could take his ladder. [60—39]

Q. That was the lower half?

A. That was the lower half; yes, sir.

Q. Where did the upper part come from?

A. It was on the job, by some of the boys getting it.

Q. You don't know who got it?

A. No, I don't really know.

Q. Did the company supply either one of those?

A. No, sir.

Q. You boys who were there on the work went and got those ladders? A. Yes, sir.

Witness excused. [61—40]

[Testimony of R. D. McMellon, for Plaintiff.]

R. D. McMELLON, having been first duly sworn, testified as follows on behalf of the plaintiff:

Direct Examination.

(By Mr. BALLINGER.)

Q. What is your name? A. R. D. McMellon.

Q. What is your business or occupation?

A. I am an electrician.

Q. Have you ever worked for the Pacific Telephone and Telegraph Co.? A. Yes, sir.

Q. During what period did you work for them?

A. I think I went to work for them on June the 5th, 1908, if I am not mistaken, and worked from then until some date in March, I am not sure what the date was.

(Testimony of R. D. McMellon.)

Q. Of what year? A. Of this year.

Q. In what capacity did you work for them?

A. I was classed as an installer in the cable department.

Q. Did you work at any time in the same gang with Frank Starr? A. Yes, sir.

Q. During what period did you work with him?

A. Well, I worked off and on with him, I think about three years of that period.

Q. Who was the foreman in charge?

A. Mr. George Smith.

Q. Who undertook to furnish the ladders that were used by the men employed by the company? [62—41]

A. The company was supposed to furnish them

Q. Through whom did they furnish them?

A. Through the foreman.

Q. Did they always supply a sufficient number?

A. They never did until after Mr. Starr's accident.

Q. They didn't at any time prior to the accident?

A. No.

Q. From time to time they didn't supply enough?

A. Never that I knew of.

Q. Now, when a job required a larger number of ladders than the company supplied, what, if any, directions were given by the foreman?

A. The foreman directed us to borrow ladders wherever we could get them, as a rule.

Q. And could you get them then?

A. Sometimes we could, if we couldn't borrow

(Testimony of R. D. McMellon.)

them we stole them—got them the best way we could, usually.

Q. Were you working in the gang with Frank Starr at the time he got hurt?

A. Yes, sir; I was working about 50 feet from him at the time he was hurt.

Q. What ladders were on the job at that time?

A. There was one company ladder and, I believe, either four or five borrowed ladders.

Q. How about the spliced ladder from which he fell—are you familiar with that ladder?

A. I saw the ladder.

Q. Do you know who borrowed the upper portion of that ladder?

A. I can't swear who borrowed it, but I think Mr. Filer borrowed it; I am not sure. [63-42]

Q. Do you know who used that for a day or two before the accident?

A. I think that Mr. Filer used it. I couldn't swear that he used it.

Q. The other portion, who borrowed it, if you know? A. Mr. McCartney, as near as I know.

Q. Do you recall the foreman being on the job at that place a couple of days before the accident?

A. He had been there every day, I believe, for a week.

Q. Do you remember whether anything was said to him about the shortage of ladders?

A. I understood there was; I didn't say nothing to him personally, myself, but I understood there was—

(Testimony of R. D. McMellon.)

Mr. DOVELL.—Never mind.

Q. Anything that others told you wouldn't be admissible.

A. I didn't do any of the complaining about it to him.

Q. Now, at the time the Filer ladder was borrowed and at the time the McCartney ladder was borrowed, aside from those two pieces of ladder, what ladder was on the job?

A. There was one extension ladder belonging to the company.

Q. Were you present the day before the accident, in the afternoon, when the foreman came on the job and something was said to him concerning some ladders were needed? A. Yes, sir, I was there.

Q. What, if anything, was said?

A. Why, I don't just know what was said in regard to the shortage of ladders. I know he told the boys. I hear him tell two of the boys to splice those two ladders together and use them.

Q. Was that done? [64-43]

A. Yes, sir, that was done.

Q. Did you see this ladder that was used for the job before the day of the accident? A. Yes, sir.

Q. What was its color and appearance?

A. It was a dark, weather-beaten ladder, unpainted.

Q. Was it rough or smooth?

A. As near as I can remember it was a rough finished ladder.

Q. Did you, from such observation of it as you

(Testimony of R. D. McMellon.)

made, see any cross-grained rungs in it?

A. No, sir.

Q. How long have you been accustomed to use ladders in the way of business?

A. For the last four or five years.

Q. Is it customary to have rungs, cross-grained rungs, in a ladder? A. No, sir, it is not.

Q. Is such a rung safe for use?

A. No, it is not, it is unsafe.

Q. You didn't observe, however, that there was any cross-grained rung in this ladder at the time before the accident?

A. No, sir, not before the accident.

Q. Was the fact that it was cross-grained observable then, by the ordinary use of the ladder without a particular inspection?

A. No, sir, it was not.

Q. When this accident happened, I understand you were about fifty feet away. What were you doing?

A. At the time of the accident I was kind of stalling around, waiting for him to finish the job he was on, so I could use [65-44] the same ladder. I had a job to do and the ladder I was using wasn't quite high enough, and I was waiting for him to finish the one he had, so I could get them.

Mr. DOVELL.—Waiting for whom?

A. For Mr. Starr.

Q. You waited then to use the ladder yourself?

A. Yes, sir.

Q. Did you notice Frank Starr working up there

(Testimony of R. D. McMellon.)

at the top of the ladder before he fell?

A. I noticed him near the top of the ladder; yes, sir.

Q. Did you observe whether he had gone higher than a place where he could hold onto the ladder with his hands?

A. No, sir, I didn't take no particular notice of it.

Q. Did not take any notice? A. No, sir.

Q. What was he doing up there, as far as you know?

A. He was fastening a cable up temporarily on the side of the building.

Q. What attracted your attention to the accident?

A. Why, I don't know whether I heard him fall, or whether I heard some of the boys call that were further up the ladder. I know some noise attracted me and turned round and saw him lying on the—

Q. Did you go where he was? A. Yes, sir.

Q. What was his condition?

A. He was unconscious when I arrived.

Q. Were you there when he was removed to the hospital? A. Yes, sir.

Q. Did his condition change any from the time that you first [66-45] saw him until he was removed to the hospital? A. No, sir.

Q. Still remained unconscious?

A. Still remained unconscious.

Q. Did you or anybody at that time take this ladder down?

A. There was two men of the company—I had

(Testimony of R. D. McMellon.)

nothing to do with it—the company sent two men out from the office to secure the ladder.

Q. Did you examine that rung at that time?

A. I did, yes, sir.

Q. What was its condition, how was it broken?

A. It was split, kind of crossways.

Q. Was the larger piece hanging down or—

A. The larger piece of it was hanging down; yes.

Q. Did you then at that time make an examination of this rung?

A. No particular examination. I just simply looked at it.

Q. Could you then detect whether or not it was cross-grained? A. Yes, sir.

Q. What was the fact as to that?

A. It was cross-grained. Nothing but a piece of cross-grained timber could split as it split.

Q. Aside from the particular break, the particular place of the break, could you see that it was cross-grained—

A. I didn't make no particular examination of it aside from where it was broken.

Q. But it was observable that it was cross-grained?

A. Yes, sir.

Q. Would that defect, that condition of the board, have been observable before the accident, if one had paid special [67-46] attention to it?

A. If they had made a close inspection of it, it would have, I think.

Q. How long had you known Frank Starr before this accident?

(Testimony of R. D. McMellon.)

A. In the neighborhood of three years. I couldn't state the exact date.

Q. What was his appearance with respect to health or sickness before the accident?

A. He always had the appearance of being very healthy.

Q. Did you ever know him to be laid off from his work, or sick, or anything, or in any manner disabled before this accident?

A. I never knew him to lose an hour's time.

Q. What was his complexion at that time with respect to color in his face?

A. Why, he was rosy complexioned fellow.

Q. What was his disposition before the injury as to being happy or unhappy?

A. He was always perfectly happy, was a jolly sort of a fellow.

Q. Have you seen him a number of times since the accident? A. I have seen him twice.

Q. What change, if any, have you noticed in him since the accident?

A. Well, he doesn't have the same healthy appearance he had before the accident.

Q. Have you noticed any change in his expression?

A. Not particularly; no. I haven't seen but very little of him, I have just seen him twice.

Q. You observed him at his work from time to time before the accident? [68-47]

A. Yes, sir.

Q. Did he appear to be a careful or careless sort of worker?

(Testimony of R. D. McMellon.)

A. I always considered him an extraordinary cautious worker, very careful.

Q. Do you know how much he was earning?

A. He was earning \$3.75 per day.

Cross-examination.

(By Mr. DOVELL.)

Q. You didn't get either one of these pieces of the ladder? A. No, sir.

Q. Who got them, do you know?

A. To the best of my knowledge, Mr. Filer got one piece of them and Mr. McCartney the other.

Q. Filer got the top part and McCartney the lower part? A. Yes, sir.

Q. McCartney and Filer were fellow employees, were they? A. Yes, sir.

Q. Working in the same line of work?

A. Yes, sir.

Q. What were you all called?

A. We were classified as installers, but we were doing cable work, working in the cable department.

Q. What did you call yourself, journeyman—

A. Journeyman installers, we were called.

Q. You and McCartney and Filer were occupying the same position, were you? A. Yes, sir.

Q. Neither one was over the other? [69-48]

A. No, sir; we were all working under the direction of Mr. Smith.

Q. Now, how close an inspection would it have required to see that this rung which broke was cross-grained?

A. Well, I imagine it would have taken a careful

(Testimony of R. D. McMellon.)

examination of it before the accident.

Q. How do you mean, how careful?

A. Well, if a man got right down and probably examined the wood real carefully and close he could have noticed it.

Q. Suppose Smith had examined it to determine whether it was cross-grained or not, what would he have had to have done, would he have had to scrape the timber? A. I think not.

Q. He wouldn't had to have done that?

A. No.

Q. Would he have had to use a magnifying glass?

A. I wouldn't judge he would have.

Q. You mean to say Smith could have seen it with his naked eye if he had just taken the ladder in his hand and looked at it?

A. I think he could, yes, if he had looked at it closely.

Q. How long would it have taken him to do that?

A. I shouldn't judge it would have taken very long.

Q. Could he have done it in an instant?

A. No, I think no.

Q. He wouldn't have had to cut into the grain or anything of that kind?

A. It wouldn't have taken him very long to examine the one rung.

Q. He wouldn't have had to scrape the timber or cut into it at all? [70—49]

A. I think not. I don't know. He might have.
Witness excused.

[Testimony of J. W. Werner, for Plaintiff.]

J. W. WERNER, having been first duly sworn, testified as follows, on behalf of the plaintiff:

Direct Examination.

(By Mr. BALLINGER.)

Q. What is your full name? A. J. W. Werner.

Q. And where do you reside? A. In Seattle.

Q. What is your business?

A. Journeyman installer.

Q. For what company are you working?

A. For the Sunset.

Q. That is the Pacific Telephone and Telegraph Co., the defendant in this case? A. Yes, sir.

Q. How long have you been working for them?

A. Well, I guess about fourteen months, something like that.

Q. Fourteen months?

A. Yes, altogether. [71-50]

Q. How long had you been working for them just before this accident? A. About a half a year.

Q. You have been working for them now about half a year?

A. No, I mean half a year before the accident.

Q. How long had you been working for them before this? A. Oh, two months, I guess.

Q. Were you brought here by the defendant in this case? A. Yes.

Q. Now, you worked. I think, for the company at the time Mr. Starr was injured? A. Yes, sir.

Q. And for quite a while before that?

(Testimony of J. W. Werner.)

A. Yes, sir.

Q. And worked, I think, in the same gang with him, did you not? A. Yes, sir.

Q. Did you work at the place where he was injured, I mean in that immediate vicinity, for two or three days before the time he was hurt?

A. I guess I was working there just about a week, I guess.

Q. How many men were working in that gang?

A. Six or seven.

Q. Was Mr. Starr one of those men?

A. Yes, sir.

Q. How many company ladders were furnished for that gang at that place?

A. Well, there was only one extension ladder.

Q. One ladder, an extension ladder?

A. Yes, two parts.

Q. Who was supposed to furnish the ladders, the company, or [72—51] the men?

A. The company.

Q. Did they always furnish a sufficient number before this accident?

A. Well, so long as I have been working for the company, I have been using the company ladder, only that extension ladder.

Q. Did you say that they always had ladders enough? A. No, I only saw one.

Q. How many men can work with one ladder?

A. Only one, if they got to use—only one man used the ladder, because if he didn't take so far up on the wall, two men work on each one.

(Testimony of J. W. Werner.)

Q. Two men would use a ladder if it were well up on the wall? A. Yes, sir.

Q. Did you see the two ladders that were spliced together before Mr. Starr was hurt? A. No.

Q. You didn't see those ladders before they were spliced?

A. No; I didn't see them before the accident.

Q. Where were you at the time of the accident?

A. Oh, I guess about three or four feet from the accident.

Q. Were you down near the foot of the ladder that Starr was climbing? A. Yes.

Q. What were your duties there?

A. Just gripping up the cable. I didn't do anything at that time. I was standing down on the ground right before the accident.

Q. You were down on the ground at the time of the accident? [73—52] A. Yes, sir.

Q. Now, did you see the ladder after it was spliced together? A. Yes, sir.

Q. Did you see the upper rung of the ladder?

A. Yes, sir.

Q. Did you observe what its color and general appearance was?

A. No, I just took a look after the accident. I didn't exactly examine it.

Q. You looked at it as one does in using an instrumentality of that kind? A. Yes, sir.

Q. Did you observe any defect in it?

A. No, sir.

Q. Whether it was cross-grained or not cross-

(Testimony of J. W. Werner.)

grained before the accident? A. No, sir.

Q. What attracted your attention to the accident?

A. Well, I just happened to look up at the time Frank, Mr. Starr, he fell down.

Q. You saw him while he was falling?

A. Yes, he was falling right straight down.

Q. Did you notice how he lit?

A. He struck the ground on his feet and then turned over.

Q. Turned over and struck on his head?

A. Yes, sir.

Q. Was he conscious or unconscious after he fell?

A. Well, he was off, unconscious for about ten or fifteen minutes, I guess.

Q. Absolutely unconscious for that length of time?

A. Yes. [74—53]

Q. What kind of a surface was there on that street—was it a paved surface or unpaved street?

A. It is paved.

Q. What is it paved with?

A. I guess—I guess it is stone, so far as I remember.

Q. Just before Frank fell what was he doing?

A. He was hanging up cable, along, going to cleat up the wall.

Q. Was he well up toward the top of the ladder?

A. That time he was not, he cleat up, hang up the cable—he was not up on the top of the ladder. He was working, I don't know how long, he was working on the ladder—I guess about ten or fifteen minutes before he went up on the top of the ladder.

(Testimony of J. W. Werner.)

Q. When he went up to the top, how was he, in what position was he, where were his hands?

A. He was holding the cable with his right hand and trying to drive a nail between the—trying to put a piece of wire on the nail in the cable.

Q. How did he have his right hand, was it up by his head?

A. His right hand being about that way (indicating).

Q. Was the cable in the palm of his hand?

A. The cable, I guess—

Q. He had then the palm of his hand somewhat upwards, and the cable resting in the palm of his hand in that manner, (indicating)? A. Yes.

Q. The left hand was holding a wire, you say?

A. Yes, holding the wire to put on the nail.

Q. To wrap it around the nail? [75—54]

A. Yes, sir.

Q. Was that position the natural and ordinary position of a line man putting up cable in that manner? A. Yes, that is the only way.

Q. Would you say that he had any opportunity in doing his work to hold on to anything, that is to say, to hold on to the side of the ladder, or to brace himself in any way, or were his hands occupied fully?

A. Well, he was standing close to the wall and he was hanging up the cable. He didn't have hold of anything except the cable.

Q. Had you observed anything wrong with the ladder before the accident?

A. No, I didn't look at it.

(Testimony of J. W. Werner.)

Q. Did you see the ladder and the rung which gave way, immediately after the accident?

A. Yes, right after the accident.

Q. What rung was broken?

A. It was the second one from the top.

Q. It was the second one from the top?

A. Yes, sir.

Q. In what manner was it broken, straight across or in a slanting direction?

A. Slanting down, from the left side down to the right.

Q. How long have you been accustomed to use ladders in your work?

A. I have been working in the business for about eight years, and been using a ladder right along.

Q. What is the fact as to whether a ladder with a cross-grained rung is safe or unsafe, what is the fact of that? [76—55]

A. Well, I don't know that they were. The most of the ladders I have been using, was a long one like an extension ladder.

Q. Suppose a ladder had a cross-grained rung, is the fact of it being cross-grained an element of danger, or not? A. I suppose; that is hard to tell.

Cross-examination.

(By Mr. DOVELL.)

Q. Is this the ladder? (Indicating ladder.)

A. Yes, sir.

Q. And is this ladder in the same condition, in exactly the same condition as it was immediately

(Testimony of J. W. Werner.)

after the accident happened? A. Yes, sir.

Q. You have examined it so that you can say that?

A. Yes.

Mr. DOVELL.—I would like to offer the ladder in evidence as part of the cross-examination of the witness.

(Whereupon said ladder was admitted in evidence as marked Defendant's Exhibit "1.")

Mr. BALLINGER.—I have no objection.

Q. This is the rung which was broken, is it?

A. Yes, sir.

Q. This was the rung, then, upon which he was standing at the time he fell? A. Yes, sir.

Mr. DOVELL.—I would like at some period during the trial to have [77—56] the Court and each member of the jury come down closely and examine the rung.

Mr. BALLINGER.—Might not the rung—he says this special rung—of course, the record doesn't show what he was pointing to. Might that not be designated in some appropriate way?

By the COURT.—I think that would be better.

Mr. DOVELL.—Let a card be tied to it and we can write on the card the rung upon which the plaintiff was standing at the time.

Mr. BALLINGER.—It is the only rung which appears on the Exhibit to be loose from the ladder on either end.

Mr. DOVELL.—Let it go into the record the witnesses have testified the rung on which the plaintiff was standing at the time the accident occurred is

(Testimony of J. W. Werner.)

the rung which appears broken upon the ladder. I think there is no dispute about that fact.

Redirect Examination.

(By Mr. BALLINGER.)

Q. This ladder, did you notice what became of it at the time of the accident?

A. We took it up to the office on 5th Avenue.

Q. And it was left there?

A. Well, I was one of them that carried it up.

Q. When did you next see it?

A. This is the first time I saw it after.

Q. This is the first time since the time you took it to the office immediately following the accident?

[78—57] A. Yes, sir.

Recross-examination.

(By Mr. DOVELL.)

Q. You didn't procure either part of this ladder, did you? A. No.

Q. You didn't get either part of it? A. No.

Witness excused. [79—58]

[Testimony of C. F. Dalton, for Plaintiff.]

C. F. DALTON, having been first duly sworn, testified as follows on behalf of the plaintiff:

Direct Examination.

(By Mr. BALLINGER.)

Q. What is your name? A. C. F. Dalton.

Q. What is your business?

A. Apprentice installer.

Q. Where do you reside? A. Seattle.

Q. How long have you been engaged in the

(Testimony of C. F. Dalton.)

business? A. About two years, with one lay off.

Q. Are you working for the defendant now?

A. Yes, sir.

Q. You were brought here as one of their witnesses? A. Yes, sir.

Q. How long have you been working for the company this time?

A. A little over a week, about two weeks.

Q. And before that what period did you work for them?

A. From January, 1911, until January, 1912.

Q. Were you acquainted with Frank Starr?

A. I was at the time he got hurt working with the company.

Q. Did you work in the same gang, bunch of men with him? A. Yes, sir.

Q. Under whose foremanship? A. Mr. Smith.

Q. The gentleman who testified this morning?

A. Yes, sir. [80—59]

Q. Were you working at the place of the accident at the time of Mr. Starr's accident? A. Yes, sir.

Q. How long had you been working in that vicinity? A. Four days.

Q. Do you recall how many men were working there? A. Six or seven.

Q. Was Mr. Starr one of them? A. Yes, sir.

Q. How many ladders did the company furnish for that work?

A. There was only one ladder that I know of that belonged to the company on the job.

Q. Who was supposed to furnish the ladders for

(Testimony of C. F. Dalton.)

the use of the men? A. The company was.

Q. Did they always furnish a sufficient number?

A. No, sir, not when we were in the gang.

Q. When the number of ladders on the job was insufficient, what did the foreman do?

A. If he couldn't procure them, he would tell us to rustle them, get them any way we could.

Q. I call your attention to the ladder which was introduced by Mr. Dovell on cross-examination of the last witness, Defendant's Exhibit "1." Do you recall how the pieces of that ladder came on the job?

A. Yes, sir.

Q. Who got the lower piece?

A. Mr. McCartney.

Q. Do you know how long before the accident?

A. I couldn't say whether it was one or two days I saw him [81—60] with it a day before.

Q. Who got the other piece?

A. I don't know but I saw Mr. Filer working on it the day before.

Q. What was he doing?

A. Putting up terminal boxes.

Q. How high are those boxes from the ground?

A. Supposed to be at least 6 or 7 feet.

Q. What was Mr. Starr doing the day before the accident?

A. Cleating a cable on a building just south of where he was at the time of the accident.

Q. That was the day before the accident?

A. Yes.

Q. Was he using ladders that day? A. No, sir.

(Testimony of C. F. Dalton.)

Q. What was he using?

A. He was in a bolstering chair hung from the roof.

Q. Did you ever see him using either one of those pieces of ladder before the day of the accident?

A. No, sir.

Q. Were you present when the foreman, Mr. Smith, came to where you men were working the afternoon before the day of the accident?

A. Yes, sir.

Q. Did you hear any conversation about ladders?

A. Yes, the men were asking for ladders.

Q. What did he say?

A. I couldn't say just what he did say.

Q. Did you hear him say anything about splicing them? A. No. [82-61]

Q. You didn't? A. No.

Q. Where were you at the time of the accident?

A. About fifty feet south.

Q. What was Mr. Starr doing at the time of the accident?

A. Tying a cable to the wall of the building.

Q. About how high above the surface of the street?

A. Practically the full length of the ladder—20 feet, I should judge.

Q. Did you see him at the moment of the accident, and what he was doing at that moment?

A. No, not at that moment. I saw him probably a few minutes before the accident.

Q. What was he doing specifically at that time?

A. Tying this cable up.

(Testimony of C. F. Dalton.)

Q. In what attitude was he?

A. Looking up at the cable, or at the position where he was going to tie the cable.

Q. Where were his hands and what were they occupied with?

A. They were above his head, one hand on the cable in that position, and the other hand attempting to tie it around the nail.

Q. To describe your attitude, now, I should say his right hand was up at the level of his head, palm upward, holding the cable in, and the left hand was also above his head, and with it he was attempting to tie a wire around a nail, is that correct?

A. That is it.

Q. What was his position in reference to the top of the ladder, that is, was he near the top of the ladder, or not? [83-62]

A. Yes, he was practically at the top of the ladder.

Q. Was that attitude the ordinary attitude of doing that sort of work in that kind of place?

A. Yes, sir.

Q. State what you observed with reference to this accident.

A. What I know about it, you mean?

Q. Yes.

A. Well, I saw him—we were coming down—McMellon and I were coming down off the roof just about the time the accident happened and we were facing south, when I heard McCartney shout out, and I turned around and saw Mr. Starr was lying on the ground.

Q. What was the surface of the street? Was it

(Testimony of C. F. Dalton.)

paved or unpaved? A. Paved.

Q. With what? A. Rough cobble-stones.

Q. Did you go to where Mr. Starr lay?

A. Yes, sir.

Q. What was his condition?

A. He was unconscious when I got there.

Q. Did you remain there until he was removed to the hospital?

A. Yes, I helped take him to the hospital.

Q. What was his condition on the way there and upon arrival at the hospital?

A. When he came to he seemed to be in pain awfully and then he lapsed into unconsciousness again.

Q. Did you examine the ladder after the accident to ascertain the cause of the accident?

A. No, I went up there to see how it happened, and I noticed the piece of the rung hanging down, and the ladder was up [84-63] at the wall at that time. I couldn't see very closely.

Q. Had you observed this ladder before the accident?

A. I saw Mr. Filer working on it as I passed by. Didn't examine it.

Q. Did you observe it after it was spliced just before the accident?

A. No, I saw it from a distance, Mr. Starr working on it after it was spliced.

Q. You merely just saw it. You made no examination? A. No.

Q. Did it appear to you at that time to be defect-

(Testimony of C. F. Dalton.)

ive in any respect?

A. I couldn't see any defect in it.

Q. You made no special examination, I presume, to ascertain how the condition was, and there was nothing to attract your attention? A. Nothing.

Q. Were you acquainted with Mr. Starr before his injury? A. Yes, sir.

Q. What sort of a complexion did he have?

A. Very robust complexion and healthy.

Q. Was there any red in his cheeks?

A. Yes, sir.

Q. To about what extent?

A. Well, I noticed during the winter time on the cold days his face would be awfully red.

Q. What would you say as to his complexion whether it appeared healthy or— A. Healthy.

Q. Healthy complexion with color in his cheeks? [85—64] A. Yes, sir.

Q. What appeared to be the condition of his health before the accident?

A. I couldn't see anything the trouble with him.

Q. Did you ever know of his being detained from his work by sickness?

A. No, sir, not while I knew him.

Q. What was his disposition as to being a happy one or unhappy one?

A. Always seemed to be happy—general good fellow.

Q. Have you seen him since his accident very often?

(Testimony of C. F. Dalton.)

A. No, I haven't seen him more than three times.

Q. Have you observed any change in his complexion since the accident? A. Yes, sir.

Q. What is that change you are speaking of?

A. Oh, his features seem to be drawn, and he has a blank stare in his eyes. I noticed it the first time I saw him after the accident.

Q. Was that drawn appearance in his face before the accident? A. No, sir, I never noticed it.

Q. Or the stare you observe in his face?

A. Not before.

Q. Have you observed any difference in his complexion? A. Oh, yes.

Q. What difference? A. Pale.

Q. He is pale now? A. Yes, sir.

Q. Have you observed any difference in his appearance with [86-65] reference to an appearance of happiness or unhappiness? A. Oh, yes.

Q. Just describe that change as you have observed it.

A. I can't describe it. You know you couldn't say he was the same man he was before the accident, that's all.

Q. Had a different appearance?

A. Different appearance.

Cross-examination.

(By Mr. DOVELL.)

Q. Did you see McCartney and the plaintiff splicing the ladder? A. Yes, sir.

Q. How long did it take them to do it?

A. I couldn't say.

(Testimony of C. F. Dalton.)

Q. About how long would you say?

A. I couldn't say. I was probably only looking at them a moment.

Q. How long was the plaintiff on the ladder before it broke?

A. From the time he commenced in the morning, I couldn't say definitely what time he did go on the ladder.

Q. You commenced at eight o'clock?

A. I don't know whether he went up on the ladder at eight o'clock, or whether it was after eight o'clock.

Q. Did you notice him from time to time for that hour and a half up on the ladder? A. Yes, sir.

Q. You were, of course, attending to your own work, but I take it you would notice him? [87-66]

A. Whenever I looked around up that way, of course, he would always attract my attention.

Q. During that hour and a half? A. Yes, sir.

Q. Could you tell how high up he was on the ladder during that time?

A. Well, he was the full length of it.

Q. Up near the top rung?

A. As near as he could get without being so close to the building he would lose his balance.

Q. During all of this time?

A. As far as I remember.

Q. See if I can get you clear. You began work at eight o'clock—this happened about half-past nine?

A. About that time.

Q. During that time, from time to time, you would

(Testimony of C. F. Dalton.)

turn around from your work and see him on the ladder, during that time? A. Yes, sir.

Q. And when you would see him he was up near the top of the ladder?

A. Somewheres up near the top, yes.

Witness excused.

[88-67]

[Testimony of Frank Starr, on His Own Behalf.]

FRANK STARR, the plaintiff, testified as follows, on his own behalf:

Direct Examination.

(By Mr. BALLINGER.)

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. How old are you? A. Twenty-five.

Q. When did you attain that age?

A. November the 16th, 1911.

Q. What was your occupation prior to the injury that has been testified to? A. Electrician.

Q. How long have you pursued that calling?

A. About six or seven years.

Q. What were your wages at the time of your injury? A. \$3.25.

Q. Per— A. Per day.

Q. How long had you worked for the defendant company at the time of your injury?

A. About four years.

Q. And had you worked steadily or only occasionally? A. Practically steady.

Q. What was the condition of your health before

(Testimony of Frank Starr.)

your injury? A. Well—

Q. Was it good or bad?

A. It was good. [89-68]

Q. Had you ever occasion to cease work on account of ill health? A. No, sir.

Q. Have you had an occasion to consult a physician at any time during this four years? A. No.

Q. You were working, I understand, in a gang of six men under the foremanship of Mr. Smith who testified this morning? A. Yes.

Q. And you were working in Post Street, between Pike and University, at the time of your accident and for some days before that?

A. Yes, sir.

Q. How long before that had you been working in this vicinity? A. About four days.

Q. Post Street was then paved or unpaved?

A. Paved.

Q. Is it level in a north and south direction or was there a slope? A. Slope.

Q. In which direction did it slope downward?

A. Sloped south.

Q. What was the particular work that you were doing in this vicinity?

A. I was hanging cable then.

Q. How high up was it being hung and on which side of the street?

A. About 20 feet high on the east side.

Q. How was it being supported—I mean to what kind of support, buildings or poles, or what? [90—69] A. Buildings.

(Testimony of Frank Starr.)

Q. Who was supposed to furnish the ladders for use in this work that you were doing?

A. The company.

Q. Did they always supply a sufficient number?

A. No, sir.

Q. On the occasions when the men had an insufficient supply of ladders, what, if anything, would the foreman do? A. He would tell us to rustle.

Q. Would you men rustle the ladders then, when he so ordered? A. Yes, sir, had to.

Q. How many men could use a ladder at one time?

A. Well, only one man could use the ladder—but there was generally two there.

Q. The second one being engaged in doing what?

A. Attending on the man on the ladder, or watching the bottom, so the wagons wouldn't hit it.

Q. What is that?

A. That is handing tools and things to him, and watching the bottom, so that no wagons could hit the bottom of the ladder, at some of those alleys where they passed through.

Q. If there were six men working, how many ladders would they need, if their work was 20 feet above the surface of the ground?

A. They would need at least three.

Q. How many ladders did the company furnish directly for that work at that time and place?

A. One.

Q. You have heard testimony concerning the use of two ladders, one of which may be designated as the Filer ladder, [91—70] and the other as the

(Testimony of Frank Starr.)

McCartney ladder? A. Yes, sir.

Q. Do you remember those ladders were on the job? A. Yes, sir.

Q. Did you use either of those ladders at any time before the day of your accident?

A. I never.

Q. What kind of support did you have to hold you up to your place of work on the days before the day of your accident?

A. I was working on the chair, swung from a pulley on the top of the building.

Q. Now, I understand you to say you used neither one of those ladders before the day of your injury?

A. No, sir.

Q. Do you know who was using the top piece there, the short ladder?

A. I noticed it was Filer working on it.

Q. Did you ever examine that ladder?

A. That is not in particular; no.

Q. You saw him though, using it? A. Yes, sir.

Q. Did you see the other ladder in use, also?

A. Yes, sir.

Q. Did you examine that with any particularity?

A. Not carefully, no.

Q. You saw it though on the job?

A. I saw it, glanced at it.

Q. Did such observation as you gave to the ladders, or either of them, disclose any danger about them?

A. No, sir, I thought they was perfectly safe.

(Testimony of Frank Starr.)

Q. Now, did you see the foreman on the job there the afternoon before the accident? A. Yes, sir.

Q. What, if any, conversation did you have with him, or hear the others have with him about ladders?

A. Why, I asked him for a longer ladder then.

Q. What did he say?

A. He said he couldn't get any, he said to splice the ones that is on the job.

Q. What ones were on the job to which he referred? A. These two.

Q. Now, was that ladder spliced—were those ladders spliced? A. Yes, sir.

Q. By whom were they spliced?

A. By McCartney and myself.

Q. Just what hand did you have in it, just what did you do in connection with it?

A. Well, I rustled wire, mostly. That is, McCartney did practically the work. I held it in place and got a couple of pieces of wire to wire it.

Q. You got the wire for it and held it in place while he spliced it? A. Yes, sir.

Q. Did you at any time before your accident know that there wasn't a cross-grained step in either of these ladders? A. No, sir.

Q. How long were you accustomed to work with ladders? A. About four years.

Q. Is it common for rungs of ladders to be made of cross-grained [93—72] pieces of wood?

A. No, sir, it is not.

Q. Would you say that this was rare or only occasionally?

(Testimony of Frank Starr.)

A. It is very seldom you will find them.

Q. Is such a rung safe for men to go up on?

A. No, sir, it isn't safe.

Q. If you had known that there was a cross-grained rung there would you have gone up on it?

A. No, sir, I wouldn't.

Q. Now, tell the Court and jury all you recollect about your accident.

A. I remember of asking Smith for a long ladder and he said, "Splice the ones you got." That was in the afternoon of Sept. the 14th, on Thursday. It was about four o'clock, so even then I asked McCartney to get off the ladder he was on, and he said, "No," because if he had got off he would have had to use the other one, so he came down, and we both spliced the ladder and then we never used the ladder that evening, we never used the ladder until the next morning.

Q. What time did you go to work the next morning? A. Eight o'clock.

Q. Now, just tell how much you recollect about the events of that day.

A. After going to work at eight o'clock, that is all I know.

Q. That is all you can remember?

A. That is all I remember.

Q. Do you remember going on this ladder at all?

A. No, sir.

Q. Do you remember falling from it? [94—73]

A. No, sir.

Q. You have no recollection of that except that

(Testimony of Frank Starr.)

you went to work on that day? A. That is all.

Q. What was the condition of your health before the accident, with respect to your ability to sleep?

A. I slept fine.

Q. What time were you accustomed to go to bed?

A. On the average of about ten o'clock.

Q. And what time were you accustomed to rise?

A. About seven.

Q. During this interval how much would you give over to sleep, how much of that time, would you sleep all the time or part of that time?

A. Sleep all the time, quick as I would get to bed, sleep.

Q. In what way would you rise, refreshed or unrefreshed? A. Refreshed.

Q. What is the first recollection you have after your accident? How long after your accident?

A. The first I remember is in the hospital when McCartney and his little girl was sitting beside me.

Q. How long was that after the accident?

A. I didn't know what day it was then. I found out since it was on Sunday.

Q. And you were injured on Friday?

A. I was injured on Friday.

Q. So you have no recollection of anything that occurred between eight o'clock on Friday morning and some hour of Sunday when Mr. McCartney and his little girl were visiting you? [95—74]

A. No, sir, not a thing.

Q. Now, during that time were you unconscious all the time or only during part of the time?

(Testimony of Frank Starr.)

A. I don't remember of a thing.

Q. Then, so far as you now know you were not conscious during that period, you have no conscious recollection? A. No.

Q. State what physical injuries you received, I mean as distinct from nervous injuries, anything of that sort, whether there were any bones broken.

A. The bone in my heel was broken.

Q. Which heel?

A. Right heel, and my head was fractured.

Q. Now, state whether or not that occasioned you any pain from these injuries.

A. It does, both of them, that is not real pain in my head; not now.

Q. Was the head painful for a time?

A. It was for three months afterwards.

Q. Now, what experience of headaches did you have before your injury?

A. I don't understand you.

Q. Were you accustomed to have headaches before your injury?

A. I never knew what the headache was.

Q. Have you any since?

A. Not a day passes but what I have it.

Q. To what extent of severity?

A. Well, it is different at different times. Sometimes I think my head will break open.

Q. Has that continued ever since the time you were injured to [96—75] the present time?

A. Ever since.

Q. How has your sleep been since your injury?

(Testimony of Frank Starr.)

A. I sleep on the average about four hours a night.

Q. Is that sleep sound or disturbed?

A. Disturbed. I generally wake up every hour or two, the least noise I hear.

Q. Were you accustomed to dream before your injury? A. Before, no.

Q. How about it now?

A. Well, I have all kinds of dreams.

Q. Are the dreams frequently of an unpleasant nature? A. Yes, very.

Q. What other phenomena have attended your sleep since your injury?

A. I have such an awful time going to sleep, in the first place. I get sleepy every night early and then if I go to bed I can't get to sleep—just a continual roaring, singing, coming out of the left ear.

Q. Have you ever walked in your sleep?

A. Yes, sir.

Q. Before the accident at any time?

A. Not before the accident, no.

Q. Have you since? A. Yes, sir.

Q. When did you first walk in your sleep after the accident? A. At the hospital.

Q. When you awakened where were you?

A. I was on, I think it was the third or fourth floor, where there was a big building, built out this way here, [97—76] and here it was vacant, and my room opened right out on that, and it was the Providence hospital, and the building wasn't finished, and there was no railing along there, and in

(Testimony of Frank Starr.)

the night some time, I don't know what time, the nurse saw me standing on the edge of that on one foot. How I got there I don't know, because I couldn't put my weight on my right foot.

Q. Was that experience effected by nightmares?

A. Yes, you might say that was a nightmare then.

Q. Now, what is your experience on waking up, after such sleep as you get in a night. Are you refreshed or unrefreshed?

A. Feel just the same as I did before I went to sleep.

Q. Have you had any trouble with your left ear since the accident?

A. I can hear out of it a very little bit.

Q. You can hear but very little? A. Yes, sir.

Q. How was the ear before your injury?

A. Just as good as my right ear, and that is good.

Q. Is it now?

A. My right ear; yes, sir.

Q. Your right ear is still perfectly normal?

A. Yes.

Q. Is your left ear so? A. No.

Q. What is your experience with respect to dizziness, or anything of that sort?

A. Right after I got hurt, I couldn't look up or down, I couldn't bend over, if I did there was a dizziness, made me [98—77] sick, want to vomit. Now, when I go to bed at night I can't sleep on my left side, that same dizziness comes on me, but not as bad as it did at first.

Q. You said, I think, that you have a continual

(Testimony of Frank Starr.)

roaring in your left ear? A. Yes, sir.

Q. What has been the condition of your nervous system since your injury?

A. Well, I am awfully nervous.

Q. Continually or only occasionally?

A. Continually.

Q. Are you able to climb, as before the accident?

A. No, sir.

Q. Why not?

A. I would be afraid to get off the ground. If one of those dizzy spells would come over me, what would I do?

Q. How about your right heel, what has been the course of that injury?

A. Why, it was broke, and even now in walking along the street, all at once it will start paining me. I have got to go sit down, can't walk on it.

Q. Suppose you walk any distance, what is the condition of the foot the next day?

A. It is stiff.

Q. Do you experience any pain in the use of the foot? A. At times, yes.

Q. Under what circumstances?

A. Why, if I would use it too much one day, the next day it is stiff, and when I bend it, it hurts. If I am walking along the street sometimes it will just naturally start [99—78] hurting and I don't know what caused it, unless it turns it or something.

Q. Have you done any work since your injury?

A. No, sir.

Q. Have you been able to do any work?

(Testimony of Frank Starr.)

A. No, sir.

Cross-examination.

(By Mr. DOVELL.)

Q. I understand you to say you don't remember anything which occurred upon the morning you were injured? A. No, sir.

Q. You don't remember that at all?

A. I don't remember a single thing of it.

Q. You didn't work upon this ladder the night before at all? A. No, sir.

Q. But that afternoon some time you and McCartney spliced the two ends together?

A. Yes, sir.

Q. How long were you working on that, how long did it take you?

A. How long would it take me to splice them?

Q. Yes.

A. I don't know, I never timed, but it would be around about a half hour.

Q. You were working about a half hour splicing it. Now, what was the matter with the rung there which broke, what caused it to break?

A. It is cross-grained, I can see now. [100—79]

Q. Mr. Smith was your foreman? A. Yes, sir.

Q. He couldn't have told it was cross-grained by looking at it before, could he?

A. Not by just glancing at it, no, sir.

Q. He couldn't have told by looking at it closer, could he?

A. If he had got right down close and been looking for a cross-grain he would have found it, yes.

(Testimony of Frank Starr.)

Q. Now, explain that, you think he could have told—you think Smith could have told so as to have kept you off the ladder if he had gotten down close to it and looked at it closer?

A. He could; yes. The same as one of those others were cross-grained, and he didn't know it.

Q. Come and show the jury.

Mr. BALLINGER.—Ordinarily, one doesn't object to any question asked of the plaintiff, but this is clearly not cross-examination. All he testified in direct was that he made no special examination of it, but that in glancing at it he had seen no defect in it. But whether it was not only defective, or whether the defect was one which might be ascertained by an examination, was not drawn out at all in chief, and having a client with a head injury and nervous, I feel that I am justified in having him confined in the cross-examination.

Mr. DOVELL.—I won't agitate him. The witness can tell me at any time. He has testified it was defective.

Mr. BALLINGER.—I think not. I may be mistaken, but my impression is he simply testified he saw nothing about it to indicate any defect, and he hasn't testified to the accident at all. [101—80]

Mr. DOVELL.—I think I have a right to cross-examine to ascertain.

By the COURT.—Objection overruled, exception allowed.

Q. Do you think the rung, by a close inspection, shows that it is cross-grained?

(Testimony of Frank Starr.)

Mr. BALLINGER.—I think that is not cross-examination.

By the COURT.—I think that is a question for the jury.

Q. Who got the two pieces of the ladder which were spliced together?

A. McCartney got the bottom part and Filer got the top.

Q. You know that of your own knowledge, do you?

A. I didn't see them borrowing them, no, but I saw them using them before.

Q. In other words, the company did not furnish either one of those pieces? A. No.

Q. Filer and McCartney, two men who were working in the same capacity you were, were they—

A. Yes, sir.

Q. Went and got them somewhere?

A. Yes, sir.

Q. The day before. The lower portion was probably gotten two days before? A. Yes, sir.

Q. The upper portion the day before, the same day you spliced them together, the upper portion?

A. I don't remember exactly whether it was got the day before or not, but it was got a day or two, something like that.

Witness excused. [102—81]

[Testimony of Dr. U. S. Bates, for Plaintiff.]

And thereupon Dr. U. S. BATES, a witness on behalf of the plaintiff, was duly sworn and testified that the plaintiff had had a fracture of the heel-

(Testimony of Dr. U. S. Bates.)

bone, which is known as the os calcis, and a fracture of the base of the skull, involving the left side of the face, extending into the ear. He testified that such an injury would be likely to produce concussion of the brain. He further testified that plaintiff now had an interference with his hearing in the left ear, so that he could barely hear a watch tick in that ear. He further testified that he had examined the plaintiff recently, and found that there is about one inch difference in the measurements of the right and left foot, which difference he attributed to the injury arising out of the accident complained of. He further testified that the bony union of the fractured bone in the foot was good, and that there is practically no deformity as a result of the fracture, but that there seems to be some swelling of the soft tissues of the ligaments, and in the opinion of the witness there is some pain in walking. The witness further testified that if the symptoms of which the plaintiff complains are real, plaintiff would not be able to do a hard day's work. The witness further testified that the plaintiff had improved since he saw him last fall, but that he didn't believe he would ever be as well as before the accident, but that he believed his youth and former condition of health would tend toward the improvement of the plaintiff, and that he believed his right foot and heel would bother him more or less the balance of his life. The witness further testified that the plaintiff does not limp, but that he believed the plaintiff would be "incapacitated for hard physical

(Testimony of Frank Starr.)

labor, where he has to stand on his feet all day.”

[103—82]

[**Testimony of Dr. A. W. Hawley, for Plaintiff.**]

Thereupon Dr. A. W. HAWLEY, being thereupon sworn as a witness on behalf of the plaintiff, testified in effect as Dr. Bates had testified. [104—83]

[**Testimony of Frank Starr, on His Own Behalf
(Recalled—Cross-examination).**]

FRANK STARR, recalled.

Cross-examination.

(By Mr. DOVELL.)

Q. What did you weigh at the time of the accident? A. About 160 pounds.

Redirect Examination.

(By Mr. BALLINGER.)

Q. What do you weigh now?

A. I haven't weighed myself yet.

Q. The last time you weighed did you notice any deviation from your ordinary weight?

A. About ten pounds.

Q. Lighter or heavier? A. Lighter.

Witness excused.

Whereupon plaintiff rested. [105—84]

And thereupon the defendant, to maintain the issues on their part to be maintained, introduced and offered in evidence the following testimony, to wit:

[Testimony of E. T. Filer, for Defendant.]

E. T. FILER, having been first duly sworn, testified as follows on behalf of the defendant:

Direct Examination.

(By Mr. DOVELL.)

Q. What is your name? A. E. T. Filer.

Q. What is your business?

A. Telephone electrician.

Q. Were you one of the gang of men working with Mr. Starr at the time this accident happened?

A. Yes, sir.

Q. How many of you in that gang?

A. Oh, presumably five or six.

Q. You have seen the ladder which I have introduced in evidence here? A. Yes, sir.

Q. That is the ladder from which Mr. Starr fell?

A. I believe it is.

Q. And it is in the same condition now that it was— A. The same practical condition.

Q. You notice the ladder is in two parts, two parts spliced together? A. Yes, sir.

Q. Do you know where those two parts came from? [106—85] A. One portion I know.

Q. Which portion?

A. The second upper portion.

Q. The top portion?

A. That would be the second, there is three portions to that ladder.

Q. Just tell the jury if you got this portion of the ladder, where you got it.

A. The upper portion I got in a passage-way be-

(Testimony of E. T. Filer.)

tween First Avenue and Post Street, presumably gotten about one-fourth of the distance from Pike; that is one-fourth of the distance between Pike and Union Street.

Q. Do you know whose ladder it was?

A. No, I don't.

Q. Did you ask anybody for it? A. No.

Q. Just went and took it? A. I took it.

Q. The company didn't furnish it? A. No, sir.

Q. Is this entire upper portion, including these slats here—when you went and got the ladder, how did you find it?

A. The top portion there was not on the piece which I got.

Q. This part was not on (indicating)? A. No.

Q. Who put that on? A. I don't know.

Q. You just got this portion (indicating)?

A. Yes, sir.

Q. Do you know who got the other portion? [107—86] A. Presumably Mr. McCartney.

Q. The company didn't furnish either?

A. No, sir.

Q. Did you see the accident? A. No, sir.

Q. You weren't there at the time?

A. Not precisely at the time. I was there forward and afterward.

Cross-examination.

(By Mr. BALLINGER.)

Q. How did you happen to get this ladder?

A. I was detailed to put up two terminal boxes.

Q. By whom? A. Mr. Smith.

(Testimony of E. T. Filer.)

Q. The foreman? A. Yes, sir.

Q. Then, how did you happen to get the ladder?

A. Well, the first part was at a height which necessitated a small ladder, so I went in the vicinity and found this upper ladder.

Q. Did you speak to Mr. Smith about it?

A. No, sir.

Q. Ask him for a ladder?

A. No, not in that case.

Q. The company was supposed to furnish these ladders?

A. Yes, they were supposed to furnish ladders.

Q. How long was it before the accident that you got this ladder? [108—87]

A. Well, according to my recollection, I believe two or three days.

Q. And you used it as you had occasion for a short ladder up to the time of the accident? A. Yes.

Q. No one else used it to your knowledge?

A. Well, I couldn't say as to whether anyone else used it.

Q. To your knowledge?

A. To my knowledge, no.

Q. The boxes were about seven feet up?

A. Well, say one was about six feet, the other was eight feet, or possibly nine or ten. One was at a higher height than the other one.

Q. You don't recollect just how high?

A. Well, approximately we will say six feet for one and eight for the other.

(Testimony of E. T. Filer.)

Redirect Examination.

(By Mr. DOVELL.)

Q. Was it uncommon for the men working as you were working to have to—as one of the witnesses expressed it—rustle ladders?

A. It was not uncommon. It wasn't particularly common.

Q. It was not uncommon? A. No.

Recross-examination.

(By Mr. BALLINGER.)

Q. Were you directed by the foreman to rustle ladders from [109—88] time to time?

A. I don't know that. I couldn't say I was particularly directed, but if we were short of ladders at a particular time, why, it was understood that we would go ahead with the work just the same, that would mean we would have to get them.

Q. The work had to be done?

A. Had to be done.

Q. You didn't consider you were engaged in the procurement of ladders for the gang to work on, but simply that where the company had failed to furnish a sufficient number, then it was understood that it was your duty to rustle?

A. Well, I wouldn't say it was my duty to rustle them, but if for instance I had to put up a terminal box, I would naturally go and get a ladder to put one up.

Q. Did you consider that you were doing the company's work in supplying this ladder?

(Testimony of E. T. Filer.)

A. Well, I don't know whether I would consider doing their work or not. I would have to go and get the ladder or something on which I would be able to reach the height, or get up to the height.

Q. The work had to be done?

A. The work had to be done.

Q. If the company failed to supply the ladder, you either had to supply it yourself or remain idle?

A. Approximately, yes.

Q. And it was the understanding that it was your duty to rustle it if the company failed to supply it?

A. We would have to do the work. [110—89]

Redirect Examination.

(By Mr. DOVELL.)

Q. I forgot to ask you, I think, after you got the ladder did you use it? A. Yes, sir.

Q. For what purpose?

A. Putting up a terminal box at a height of about six feet.

Q. Then, did you discard it?

A. For the next box I did.

Q. Why?

A. Because it was sufficiently long, that is sufficiently long enough, and I questioned its safety.

Q. Why did you question its safety?

A. It looked rather frail.

Q. And what did you do for a ladder?

A. I made up another one.

Q. Got the material there and made it up?

A. I found two pieces of two by four, with a few rungs off on the ladder, right on the bottom por-

(Testimony of E. T. Filer.)

tion, and then I added two.

Q. How long a ladder did you make?

A. That made a ladder probably seven, or possibly eight feet.

Q. That was the day before this accident happened?

A. I couldn't say as to the exact date, but previous to the accident.

Q. Just the day before, or fix it as nearly as you can?

A. Practically a couple of days before. [111—90]

Recross-examination.

(By Mr. BALLINGER.)

Q. You say you discarded this because you believed it unsafe?

A. I didn't want to go to the top on this ladder, so I thought I would get something more substantial.

Q. You did that because you were afraid that the ladder might not be safe?

A. That is, if I were to reach the top of the ladder, put my weight on the top of the ladder.

Q. Did you notice the cross-grain of that?

A. No, I didn't notice the cross-grain.

Q. But it looked like a frail ladder?

A. It looked like a frail ladder.

Q. Did you call the attention of the boys working on the job to your having discarded it, or the reason you did it? A. I don't recollect that I did.

Q. You didn't say anything to any of them about

(Testimony of E. T. Filer.)

it, to your recollection? A. No.

Q. Did you to Mr. Smith? A. No.

Witness excused.

Whereupon defendant rested.

[Motion for Entry of Judgment for Defendant.]

Mr. DOVELL.—I desire, if your Honor please, to submit a challenge to the testimony because of the legal insufficiency [112—91] thereof, and move the Court to enter judgment for the defendant.

(Argument by counsel.)

And there being no other or further testimony, admissions or exhibits, the above and foregoing is all the evidence adduced at this trial of this cause.

Whereupon court adjourned until Wednesday morning, October 9, 1912, 10 o'clock.

[Order Denying Motion for a Directed Verdict.]

By the COURT.—The motion for the directed verdict in this case will be denied and exception allowed.

[Instructions.]

And thereupon, at the conclusion of the argument by counsel, the Court instructed the jury as follows:
GENTLEMEN OF THE JURY:

This is an action brought by the plaintiff, Frank Starr, against the defendant and the Pacific Telephone and Telegraph Company, to recover for certain personal injuries alleged to have been inflicted upon the plaintiff through the negligence of the defendant on or about the 15th day of September, 1911.

Briefly, the plaintiff alleges that his injuries were

occasioned by the breaking of the top rung of a ladder, which rung—the plaintiff alleges the top rung, but the testimony showed it was another,—so I say by the breaking of a rung of [113—92] the ladder, which rung he claims was defective in this, that it was cross-grained, so that the same was weak and unfit for use and too weak to hold the weight of a man standing upon it; that this defective condition could have been ascertained by an inspection by the defendant or its foreman, but that no such inspection was made, and he further alleges that he did not know that the rung in question was defective, weak or insufficient, and that he was not warned thereof, that he supposed the rung was sufficient for his use in the performance of his work; that in the performance of his work he stood upon the rung in question, when the same broke and he fell some 20 feet to the surface of Post Street, which was paved, and thereby received the injuries complained of.

To this complaint the defendant answered, admitting that the plaintiff was on the 15th day of September, 1911, and for a long time prior thereto, in the employ of the defendant in the City of Seattle, but otherwise he denies the allegation contained in the plaintiff's complaint.

The defendant, in its answer, pleads affirmatively that the reasonable peril attending the work in which the plaintiff was engaged at the time of the happening of the accident described in the complaint was open and apparent and well known by the plaintiff and assumed by him.

This is in substance set out in the first affirmative

defense contained in the answer. A second affirmative defense is set forth in the answer, which in substance is to the effect that the injuries, if any, received by the plaintiff, were caused and contributed to by his own carelessness and negligent acts, and by the careless and [114—93] negligent acts of his fellow-servants.

To this answer the plaintiff has filed a reply denying all of the allegations and averments in both the first and second affirmative defenses.

This is a brief statement of the case, and you will be permitted to take the complaint, answer and reply with you to the jury-room, for the purpose of ascertaining what the issues in this case are.

These pleadings you are not to consider as evidence in the case, but are to examine only for the purpose of determining the issues between the parties, as defined to you in the light of these instructions. You are instructed that before the plaintiff will be entitled to recover in this case, he must prove to your satisfaction by a fair preponderance of the evidence, that the proximate cause of his injuries in question was occasioned through the negligence of the defendant, and in this connection you are instructed that as a matter of law it was the duty of the defendant to furnish appliances free from defects discoverable by the exercise of ordinary care; that the defendant owed a duty to the plaintiff to exercise reasonable care and skill, not only in furnishing safe appliances, but in keeping them in a safe condition, and that this is not a duty that could be delegated by the defendant, to the fellow-

servants of the plaintiff. But if you find that the defendant undertook to delegate such duties to the fellow-servants of the plaintiff, you are instructed that this will not excuse the defendant for any default, if you find such there was, in the furnishing of safe appliances and in keeping them in a safe [115—94] condition, which might arise from the negligence of those to whom the duty had been delegated. The defendant is not an insurer of the safety of appliances furnished, but is only held to the exercise of ordinary care in seeing to it that the appliances furnished are free from defects that might be discoverable by the exercise of ordinary care.

Negligence is the omission to do something that a reasonably prudent man, guided by those considerations that ordinarily regulate the conduct of human affairs, would do, or doing something that a prudent or reasonable man would not do under all the circumstances of the particular transaction.

I instruct you that negligence is never presumed, and the mere fact that one is injured while in the employ of another raises no presumption of negligence on the part of the employer. If you shall determine that the plaintiff has, by a fair preponderance of the evidence, established the fact that the injuries complained of were the proximate cause of the defendant's negligence, in failing to furnish safe appliances, being a ladder in this case, or through the failure of the defendant after furnishing it, to properly inspect and keep the same in repair, it will then be your duty, before you can find

for the plaintiff, to determine whether or not the defendant has established by a fair preponderance of the evidence, the allegations of its affirmative answers, as to the assumption of risk, or contributory negligence of the plaintiff.

If you find from the evidence that the defendant has [116—95] established by a fair preponderance, that the danger of using the rung of the ladder in question was so obvious, that no ordinarily prudent person would have used the same in the manner the plaintiff used it, then it will be your duty to find that the plaintiff assumed the risk of the ordinary dangers in so using the same, and those risks and dangers which are known, or are so plainly observable that the plaintiff may be presumed to have known them, and that if he continues in the defendant's employ without objection, after such knowledge, he took upon himself the risk of injury from such defects and cannot recover in this action. That is what is known as the doctrine of assumption of risk. And further, if the defendant has established by a fair preponderance of the evidence, that under all the facts and circumstances in this case, the plaintiff failed to use those precautions for his own safety which ordinary prudence, under the circumstances, would require, he was guilty of contributory negligence, and cannot recover.

The burden of proof in this case is upon the plaintiff to establish all the material allegations of his complaint by a fair preponderance of the evidence, and the burden of proof is on the defendant to establish all the material allegations of one or the

other, of their first and second affirmative defenses. If the defendant establishes by a fair preponderance of the evidence, to your satisfaction, that the plaintiff, under the circumstances, assumed the risk, or in like manner that he was guilty of contributory negligence, you should find for the defendant. [117—96]

You are instructed that the preponderance of the evidence is not alone determined by the number of witnesses testifying to any particular fact in the case, but the testimony of the greatest convincing power, the testimony which has the most convincing power with you, whether one or many witnesses testify to such fact, and in determining where the preponderance of the evidence is in this case, you should take into consideration the demeanor of the witnesses upon the witness-stand, the opportunity of the witnesses for knowing about the things concerning which they have testified; the probability of the stories of the several witnesses; the interest or lack of interest of the several witnesses who have testified before you, and taking in connection with all these, the circumstances as detailed by the witnesses upon the witness-stand in the trial of this case, and from all these determine where the preponderance of the evidence is, or in other words where the greater weight of the testimony lies, or the truth lies in this case, and when you have determined that, you will have determined where the preponderance of the evidence is. And if you should find it is equally balanced, that is, it does not

preponderate one way or the other, you shall find against the party upon whom the burden of proof upon that issue lies.

If you should find for the plaintiff, you will fix his damages in such sum as will compensate him for the injuries he has received, for the loss of his earning power, past and future, and the sum that the same has been reduced, if you find that it has been reduced by reason of such injuries, together with such sum as you may determine that he is entitled to, by reason of pain and suffering, [118—97] and also such sums as the evidence satisfies you he has paid or will hereafter be compelled to pay for medicine and treatment of his injuries.

You should not award any sum as penalty or punishment of the defendant, but it should be your endeavor to make the plaintiff as nearly whole as may be under all of the circumstances in this case, so as to compensate him in money for the loss, if any, he has sustained, and will in the future sustain by reason of the injury in question, in no case exceeding the sum mentioned in the complaint.

You are instructed that the sum mentioned in the complaint is not a criterion of the amount that you are to award, but only a limit beyond which you cannot go.

You will consider this case in a dispassionate manner, without sympathy or prejudice for one side or the other, and as twelve honest men determine this case between these two litigants the same as if they were individuals, and the same as you would want twelve men to pass upon the matter if you were one

of the interested parties.

You are instructed that you are the sole and exclusive judges of the facts in this case, and you must determine what the facts are, but the law you must take from the court.

You will disregard anything counsel may have said to you in their argument on the facts in this case, or upon any matter addressed to the court, except in so far as their statements may be sustained by the testimony in this case. [119—98]

You are the sole and exclusive judges of the credibility of the witnesses who testified before you. In determining the weight or credit you desire to attach to the testimony of any witness, you will have the right to take into consideration, and it is your duty to do so, the demeanor of the witnesses upon the witness-stand; their opportunity of knowing about the things which they have testified; their interest or lack of interest in this case; the reasonableness of the stories of the several witnesses who have testified before you; their demeanor and manner of testifying, and from all this determine where the truth of the case lies.

In determining the weight or credit you desire to attach to the testimony of any witness, you should apply the same test as you would to any person in the ordinary affairs of life, whose truth or falsity is to be considered by you. Harmonize the testimony of all the witnesses who have testified before you, if this can be done in theory, consistent with the truth, you must do so,—but if you find any witness has willfully testified falsely concerning any material matter or

fact in this case, you have the right to disregard his entire testimony, except in so far as you may find it corroborated by other credible witnesses and circumstances detailed and developed upon the trial.

If you find under these instructions for the plaintiff, this will be your form of verdict:

“In the District Court of the United States for the Western District of Washington.

No. 2025.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH
CO.,

Defendant.

[120—99]

Verdict.

We, the Jury, in the above-entitled case, do find for the plaintiff and assess his damage at \$———. You will insert in the blank space the number of dollars you find for the plaintiff, and cause the verdict to be signed at the bottom by your foreman.”

If, under these instructions you find for the defendant, this will be your form of verdict:

“The same title and court: We the Jury in the above-entitled case, do find for the defendant,” and you would cause that to be signed by your foreman, if that is your verdict.

Twelve of your number must agree on a verdict in this case, and when you have agreed upon a ver-

diet, you will have your foreman sign it and report to the court. Upon your retirement you will appoint one of your number foreman.

As stated, the pleadings in this case will be sent to the jury-room. You are not to consider them as evidence in the case. The instructions of the Court are the law in the case. The exhibits will also be sent to the jury-room, and these you should consider in connection with the evidence in this case.

[Withdrawal of Any Claim on Account of Medical Attention, etc.]

Mr. BALLINGER.—I observe the Court instructed the jury in case they find for the plaintiff, they might consider, in making up the award, any sums necessarily expended for medical attention, and I rise now to withdraw any claim on account of medical attention or medicines or hospital [121—100] fees.

By the COURT.—Gentlemen of the Jury, there was no testimony offered in this case as to any moneys expended for medicine or hospital fees, of any that would be hereafter expended for medicine or hospital fees, and in arriving at the amount of your verdict, if you should find for the plaintiff, you will not allow any items, or take into consideration any amounts for this purpose, doctor's bills or medicine.

Jury retired.

And thereupon the defendant excepted to the instructions of the Court as follows:

[Exceptions to Instructions Given and Refused.]

We except to the refusal of the Court to give to the

jury defendant's requested instruction No. 2, we except to the refusal of the Court to give to the jury defendant's requested instruction No. 3; we except to the refusal of the Court to give defendant's requested instruction No. 4, and likewise we except to the refusal of the Court to give to the jury defendant's requested instruction No. 5.

The defendant desires to except to so much of the Court's instructions as told the jury that the duty devolved on the master in this case to furnish safe appliances, for the reason that under the evidence in this case, it is an admitted fact that the appliance which caused the injury was not furnished, or attempted to be furnished by the master.

By the COURT.—The exception will be allowed.
[122—101]

[Order Settling Bill of Exceptions.]

The foregoing entitled cause coming on regularly for hearing before the Court on this 31st day of December, 1912, the time duly designated by the Court for settling and certifying bill of exceptions therein, the plaintiff and defendant now appearing by their respective attorneys of record herein, and the said defendant having within the time extended by stipulation and order of the Court herein for that purpose, duly proposed the foregoing as a bill of exceptions in said action, and no amendments thereto having been proposed by the plaintiff, and the parties now agreeing to the settlement of the foregoing as the bill of exceptions in this action,—

Now, it is by the Court and the Judge of said Court presiding at the trial of said cause ORDERED and

CERTIFIED that the foregoing be and the same hereby is settled as the true bill of exceptions in said cause, and that said bill of exceptions, together with Plaintiff's Exhibit One, includes all the material facts and evidence herein, and is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein, and the same being so settled and certified, it is hereby ordered to be filed herein by the clerk.

CLINTON W. HOWARD,

Judge.

[Indorsed]: Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Dec. 31, 1912. Frank L. Crosby, Clerk. By E. M. L., Deputy Clerk. [123]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Now, on this 2d day of January, 1913, comes the defendant by its attorneys, Messrs. Hughes, Mc-Micken, Dovell & Ramsey, and says: That the judg-

ment entered in the above cause on the 19th day of October, 1912, is erroneous and unjust—

First: Because it adjudges that the said plaintiff shall recover the sum of Eight Thousand Dollars (\$8,000) against the said defendant.

Second: Because it adjudges that the said plaintiff shall recover of and from the defendant any sum.

Third: Because the evidence was insufficient to support or justify the verdict rendered in said cause on the 10th day of October, 1912, and upon which verdict said judgment is based.

Fourth: Because the evidence upon the trial of said cause was insufficient to establish any negligence on the part of this defendant.

Fifth: Because the evidence upon the trial of said [124] cause shows that the ladder, the defective condition of which it is claimed caused the accident, was not furnished by the defendant, as is alleged in the complaint, or at all, but upon the contrary was secured by the plaintiff and his fellow-servants.

Sixth: Because the evidence upon the said trial was insufficient to establish that there was any latent or hidden defect in said ladder, or any defect which the plaintiff by the exercise of ordinary care would not have observed and understood.

Seventh: Because the Court erred in not holding as a matter of law that the plaintiff was guilty of contributory negligence.

Eighth: Because the Court erred in not holding

as a matter of law that the plaintiff assumed any risk or peril attending the use of the appliance which caused the injury.

Ninth: Because the Court erred in refusing to grant the motion of the defendant for a nonsuit and direct a verdict at the close of plaintiff's evidence.

Tenth: Because the Court erred in refusing to sustain the challenge of the defendant to the sufficiency of the evidence and to grant a motion for a directed verdict at the close of all the evidence.

WHEREFORE, the defendant prays that said judgment be reversed and the District Court directed to dismiss said action as prayed in the answer herein.

HUGHES, McMICKEN, DOVELL &
RAMSEY,

Attorneys for Defendant.

Copy of above assignment of error received, and due service of same acknowledged this 3d day of January, 1913.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff. [125]

[Endorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 3, 1913. Frank L. Crosby, Clerk. By E. M. L. Deputy. [126]

*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a Corporation,
Defendant.

Petition for Order Allowing Writ of Error.

The said defendant, The Pacific Telephone and Telegraph Company, a corporation, feeling itself aggrieved by the judgment entered in said cause on the 19th day of October, 1912, in favor of said plaintiff and against said defendant for the sum of Eight Thousand (\$8,000) Dollars, and said plaintiff's costs and disbursements, in which judgment, and the proceedings leading up to the same, certain errors were committed to the prejudice of said defendant, which more fully appear from the assignment of errors which is filed herewith, comes now and prays said Court for an order allowing the said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, under and according to the laws of the United States in that behalf made and provided, and also prays that an order be made fixing the amount of security which the said defendant shall give upon said writ of error, and that upon the furnishing of said security all fur-

ther proceedings in this cause be suspended and stayed until the determination of said writ of error by said Circuit Court of Appeals for the Ninth Circuit. And further prays [127] that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and your petitioner will ever pray.

Dated this 3rd day of January, A. D. 1913.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Defendant.

Copy of within Petition for Order Allowing Writ of Error received, and due service of same acknowledged this 3d day of January, A. D. 1913.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff.

[Endorsed]: Petition for Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington. Jan. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [128]

*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a Corporation,
Defendant.

Order Granting Writ of Error and Fixing Amount of Bond.

This cause coming on this day to be heard in the courtroom of said court in the City of Seattle, Washington, upon the petition of the defendant, The Pacific Telephone and Telegraph Company, a corporation, herein filed, praying the allowance of a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, together with the assignment of errors, also herein filed, in due time, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

The Court having duly considered the same does hereby allow the said writ of error prayed for, and it is ORDERED that upon the giving by said defendant, The Pacific Telephone and Telegraph Company, a corporation, of a bond according to law, in the sum of Ten Thousand (\$10,000.00) Dollars, the same shall operate as a supersedeas bond and all proceedings be [129] stayed, pending the determination of said writ of error.

Dated this 3d day of January, A. D. 1913.

CLINTON W. HOWARD,
Judge.

Copy of foregoing order received and service of same acknowledged this 3d day of January, A. D. 1913.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff.

[Indorsed]: Order Granting Writ of Error and Fixing Amount of Bond. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [130]

*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a Corporation,
Defendant.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS, that we, The Pacific Telephone and Telegraph Company, a corporation, the above-named defendant, as principal, and National Surety Company, a body corporate, duly incorporated under the Laws of the State of New York and authorized to transact the business of surety in the State of Washington, as

surety, are held and firmly bound unto Frank Starr, the above-named plaintiff, in the sum of Ten Thousand Dollars to be paid to said plaintiff, his executors, administrators and assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 3d day of January, 1913.

The condition of the above obligation is such that whereas in the above court and cause, final judgment was [131] rendered against the said defendant and in favor of said plaintiff, in the sum of Eight Thousand Dollars (\$8,000), with plaintiff's costs and disbursements; and

WHEREAS, the said defendant has obtained from said Court a writ of error to reverse the judgment in said action, and a citation directed to the plaintiff is about to be issued citing and admonishing him to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at San Francisco, in the State of California:

NOW, THEREFORE, if the said defendant, The Pacific Telephone and Telegraph Company, a corporation, shall prosecute the said writ of error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void, otherwise

to remain in full force and effect.

THE PACIFIC TELEPHONE AND
TELEGRAPH CO. [Seal]

By F. L. McNALLY,
Its Agent.

By HUGHES, McMICKEN, DOVELL &
RAMSEY,

Its Attorneys.

NATIONAL SURETY COMPANY.

[Seal of National Surety Company]

By GEO. W. ALLEN,
Atty. in Fact.

The sufficiency of the surety on the foregoing bond
approved by me this 3d day of January, 1913.

CLINTON W. HOWARD,
Judge of said Court. [132]

Copy of within Supersedeas Bond received, and
due service of same acknowledged this 3d day of Jan-
uary, 1913.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff.

[Indorsed]: Supersedeas Bond on Appeal. Filed
in the U. S. District Court, Western Dist. of Wash-
ington, Jan. 3, 1913. Frank L. Crosby, Clerk.
By E. M. L., Deputy. [133]

Writ of Error [copy].

UNITED STATES OF AMERICA,—ss.

The President of the United States of America
to the Judges of the District Court of the United
States for the Western District of Washington,
Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said District Court before you, or some of you, between Frank Starr, plaintiff, and The Pacific Telephone and Telegraph Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said The Pacific Telephone and Telegraph Company, a corporation, defendant, as is said and appears by the complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justice of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the first day of February, 1913, that the record and proceedings aforesaid being inspected, the said justice of the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done. [134]

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 3d day of Jan., in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States the one hundred and thirty-seventh.

[Seal] FRANK L. CROSBY,
Clerk of said District Court of the United States, for
the Western District of Washington.

The foregoing writ is hereby allowed.

CLINTON W. HOWARD,
United States District Judge, for the Western Dis-
trict of Washington.

Copy of within Writ of Error received, and due service of same acknowledged this 3d day of January, 1913.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff.

[Indorsed]: Original. No. 2052. In the United States District Court, Western District of Washington, Northern Division. Frank Starr, Plaintiff, vs. The Pacific Telephone and Telegraph Company, a Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. Hughes, McMicken, Dovell & Ramsey, Attorneys for Defendant. 661-670 Colman Building, Seattle, Wash. [135]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,

Defendant.

Citation [on Writ of Error (Copy)].

United States of America,—ss.

To Frank Starr, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in the City of San Francisco, State of California, on the first day of February, 1913, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein The Pacific Telephone and Telegraph Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be

done to the parties in that behalf.

Dated the 3d day of January, 1913.

(Signed) CLINTON W. HOWARD,

United States District Judge for the Western District of Washington. [136]

[Seal] Attest: FRANK L. CROSBY,

Clerk of said United States District Court for the Western District of Washington.

By,

Deputy.

We hereby, this 3d day of January, 1913, acknowledge service of the foregoing Citation at the City of Seattle, Washington.

REYNOLDS, BALLINGER & HUTSON,

Attorneys for said Frank Starr.

Received copy of the foregoing Citation lodged with me for defendant in error this 3d day of January, 1913.

[Seal]

FRANK L. CROSBY,

Clerk of said United States District Court. [137]

[Endorsed]: Copy. No. 2052. In the United States District Court, Western District of Washington, Northern Division. Frank Starr, Plaintiff, vs. The Pacific Telephone and Telegraph Company, a Corporation, Defendant. Citation on Appeal (Lodged Copy). Filed in the U. S. District Court, Western Dist. of Washington. Jan. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [138]

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,

Defendant.

Stipulation Relative to Exhibit.

It is hereby stipulated between the parties hereto that the clerk of this court in making up his return to the writ of error herein shall include therein and transmit therewith as a part of the record the original ladder introduced in evidence herein as Plaintiff's Exhibit No. 1.

Dated January 6th, 1913.

REYNOLDS, BALLINGER & HUTSON,

Attorneys for Plaintiff.

HUGHES, McMICKEN, DOVELL & RAM-
SEY,

Attorneys for Defendant.

[Indorsed]: Stipulation Relative to Exhibit.
Filed in the U. S. District Court, Western Dist. of
Washington, Jan. 6, 1913. Frank L. Crosby, Clerk.
By E. M. L., Deputy. [139]

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a Corporation,

Defendant.

Order for Sending Up Original Exhibit.

Agreeably to the written stipulation of the parties this day filed herein, and it being in the opinion of the presiding Judge undersigned deemed proper that the clerk of this court in making up his return to the writ of error herein shall include therein and transmit therewith as a part of the record the original ladder introduced in evidence herein as plaintiff's exhibit No. 1;

It is now by the undersigned presiding Judge of said court ordered that said original exhibit be sent up by the clerk of this court as a part of his return to the writ of error herein to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 6th day of January, 1913.

CLINTON W. HOWARD,

United States District Judge. [140]

[Indorsed]: Order for Sending up Original Exhibit. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 6, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [141]

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a Corporation,
Defendant.

Stipulation as to Record.

It is hereby stipulated between the parties hereto that the clerk of this court in making up his return to the writ of error herein shall include therein the following:

Complaint included in transcript of record filed November 7, 1911, on removal from the Superior Court of Washington for King County;

Order of removal included in transcript of record on removal filed herein November 7, 1911;

Answer;

Reply;

Original exhibit specified in stipulation between the parties dated January 6th, 1913;

Verdict;

Memorandum of costs and disbursements;

Judgment;

Motion for new trial;

Order overruling motion for new trial; [142]

Bill of exceptions;

Assignment of errors;

Petition for order allowing writ of error;

Order granting writ of error and fixing amount
of bond;

Supersedeas bond;

Writ of error;

Original citation and acceptance of service
thereon;

Copy of citation lodged with clerk for defendant
in error;

Stipulation and order respecting exhibit;

Stipulation as to record;

which comprise all the papers, exhibits, depositions
and other proceedings which are necessary to the
hearing of said cause upon such writ of error in the
United States Circuit Court of Appeals, and that no
other papers or proceedings than those above men-
tioned need be included by the clerk of said court in
making up his return to said writ of error as a part
of such record.

Dated January 6th, 1913.

REYNOLDS, BALLINGER & HUTSON,

Attorneys for Plaintiff.

HUGHES, McMICKEN, DOVELL & RAM-
SEY,

Attorneys for Defendant.

[Indorsed]: Stipulation as to Record. Filed in
the U. S. District Court, Western Dist. of Washing-
ton, Jan. 6, 1913. Frank L. Crosby, Clerk. By E.
M. L., Deputy. [143]

[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a Corporation,
Defendant.

United States of America,
Western District of Washington,—ss.

I, F. L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the 151 typewritten pages, numbered from 1 to 151, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, depositions and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on writ of error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same, together with the original of Plaintiff's Exhibit 1, which said original exhibit is transmitted herewith pursuant to the order of Court so directing, constitute the record on return to said writ of error herein from the judg-

ment of said United States District Court for the Western [144] District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that I hereto attach and herewith transmit the original writ of error and original citation issued in this cause.

I further certify that the cost of preparing and certifying the foregoing transcript is the sum of Sixty-six and 77/100 (\$66.77) Dollars, and that the said sum has been paid to me by Hughes, McMicken, Dovell & Ramsey, attorneys for defendant.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said district, this 22d day of January, 1913.

[Seal]

FRANK L. CROSBY,
Clerk. [145]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a Corporation,
Defendant.

Citation [on Writ of Error (Original)].

United States of America,—ss.

To Frank Starr, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in the city of San Francisco, State of California, on the first day of February, 1913, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein The Pacific Telephone and Telegraph Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated the 3d day of January, 1913.

CLINTON W. HOWARD,

United States District Judge for the Western District of Washington. [146]

[Seal] Attest: FRANK L. CROSBY,

Clerk of said United States District Court for the Western District of Washington.

By,

Deputy.

We hereby, this 3d day of January, 1913, acknowledge service of the foregoing citation at the city of Seattle, Washington.

REYNOLDS, BALLINGER & HUTSON,

Attorneys for said Frank Starr.

Received copy of the foregoing citation lodged with me for defendant in error this 3d day of January, 1913.

[Seal]

FRANK L. CROSBY,

Clerk of said United States District Court. [147]

[Endorsed]: Original. No. 2052. In the United States District Court, Western District of Washington, Northern Division. Frank Starr, Plaintiff, vs. The Pacific Telephone and Telegraph Company, a Corporation, Defendant. Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [148]

Writ of Error [Original].

United States of America,—ss.

The President of the United States of America to the Judges of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said District Court before you, or some of you, between Frank Starr, plaintiff, and The Pacific Telephone and Telegraph Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said The Pacific Telephone and Telegraph Company, a corporation, defendant, as is said and appears by the complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party afore-

said, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justice of the United States Circuit Court of Appeals for the Ninth Circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the first day of February, 1913, that the record and proceedings aforesaid being inspected, the said justice of the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done. [149]

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this third day of January, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States the one hundred and thirty-seventh.

[Seal] FRANK L. CROSBY,
Clerk of said District Court of the United States,
for the Western District of Washington.

The foregoing writ is hereby allowed.

CLINTON W. HOWARD,
United States District Judge for the Western Dis-
trict of Washington. [150]

Copy of within Writ of Error received, and due service of same acknowledged this 3d day of January, 1913.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff. [151]

[Endorsed]: Original. No. 2052. In the United States District Court, Western District of Washington, Northern Division. Frank Starr, Plaintiff, vs. The Pacific Telephone and Telegraph Company, a Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

[Endorsed]: No. 2242. United States Circuit Court of Appeals for the Ninth Circuit. The Pacific Telephone and Telegraph Company, a Corporation, Plaintiff in Error, vs. Frank Starr, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division. Filed January 25, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

<hr/>	}	No.....
THE PACIFIC TELEPHONE AND TELE-		
GRAPH COMPANY, a corporation,		
<i>Plaintiff in Error,</i>		
vs.		
FRANK STARR,	}	
<i>Defendant in Error.</i>		
<hr/>		

**Upon Writ of Error to the United States District Court
for the Eastern District of Washington,
Northern Division.**

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF CASE

This action, brought to recover damages for a personal injury, was predicated upon the charge in the complaint that Frank Starr, then and there being in the employ of The Pacific Telephone and Telegraph Company as an installer, was injured by the breaking of a ladder upon which he was standing

while attempting to fasten a cable to the wall of a building upon Post Street in the City of Seattle. He alleged in his complaint as the gist thereof, as follows:

“That on September 15, 1911, the gang, of which plaintiff was a member, under the direction of said foreman, was engaged in putting up a cable on the wall of a building abutting on Post Street, in the City of Seattle, between Pike and Union streets, in said city; *that certain ladders had been furnished for said gang of men by the defendant for their use and plaintiff had nothing to do with the furnishing of said ladders*; that said cable was being fastened to said wall at a height of approximately 25 or 30 above the surface of said Post Street, and said ladders being separately too short to reach to said point, the same, by the direction of said foreman, were spliced together and plaintiff, in the discharge of the duties of his employment, went upon said ladders to fasten said cable; that because of the shortness of said ladders it was necessary for plaintiff to take his position and he did take his position upon the top rung of the uppermost of said ladders; that the topmost of said ladders was defective in this, that the top rung thereof was cross grained so that the same was weak and unfit for use, the same being too weak to hold the weight of a man standing upon it; that defendant and said foreman, by a reasonable inspection of said ladder, could have ascertained the condition of said rung, and it would have been apparent upon said inspection that the same was dangerous and unfit for use and would be likely to break if anyone took up a position on said rung, but neither said foreman nor other agent of defendant made such inspection; and that plaintiff did not know said rung was defective, weak or insufficient and was not warned thereof, and supposed that the rung was sufficient for his use in the performance of his work. That when plaintiff in the performance of his duties as aforesaid went upon

said ladder and stood upon said rung, as his duties required him to do, the same broke, and plaintiff therefrom fell a distance of about 20 feet to the surface of said Post Street which was paved, and thereby received the injuries hereinafter set forth; that said accident was wholly due to the negligence of defendant in furnishing to plaintiff for use in the performance of his duties, said unsafe ladder and in failing to inspect the same, and in failing to warn him of his danger in using the same, and was not due to any carelessness or negligence on the part of plaintiff." (Record p. 3.) (*Italics ours.*)

The trial resulted in a verdict and judgment in favor of Starr in the sum of \$8,000, and it is this judgment we seek to have reversed. There was little, if any, conflict in the testimony, and we state the salient points thereof with confidence that there will be no issue between opposing counsel and ourselves as to the facts.

Frank Starr was at the time of the accident about 25 years of age, was an electrician and a journeyman installer. He had been in the employ of the defendant company for four years, working steadily. (Record p. 82.)

The occupation of installer requires that work be done in attaching wires to poles and buildings, in which work the use of ladders is constantly required. The plaintiff at the time of the happening of the accident and for some days prior thereto had been with six other men engaged in fastening a cable to the rear of a building upon Post Street at a height of about 20 feet. It appears to have been the custom of the company to permit the installers to secure

their own ladders provided they did not have sufficient upon the ground to do the work.

The plaintiff testified:

“Q Did they (the company) always supply a sufficient number?

A No, sir.

Q On the occasions when the men had an insufficient supply of ladders, what, if anything, would the foreman do?

A He would tell us to rustle.” (Record p. 84.)

McCartney, a witness for the plaintiff, said:

“Q Now, when, as you say, the company failed to supply a sufficient number of ladders, how were they procured?

A Well, they used to have to rustle around the alleys and get them.

Q By whose orders would they do that?

A By the foreman, if he was there, and if he wasn't there, we would take that on our own responsibility, because we had to have them—” (Record p. 39.)

Filer, one of the witnesses, said:

“Q Was it uncommon for the men working as you were working to have to—as one of the witnesses expressed it—rustle ladders?

A It was not uncommon. It wasn't particularly common.

Q It was not uncommon?

A No.

Q Were you directed by the foreman to rustle ladders from time to time?

A I don't know that. I couldn't say I was particularly directed, but if we were short of ladders at a particular time, why, it was understood that we would go ahead with the work just the same, that

would mean we would have to get them.” (Record p. 101.)

The other witnesses quite agreed with this testimony—that when a ladder was lacking the installers procured it for themselves.

The day before the accident happened McCartney and Filer, two men engaged in the same work as the plaintiff and consequently fellow-servants, had gone to some place in the neighborhood and secured two pieces of ladder, one about 12 feet long and the other about 7 feet long. Filer secured the shorter ladder and used it for a short time upon which to stand while he was putting up a terminal box at a height of about 6 feet. After a short experience he discarded his short ladder, testifying as a reason therefor as follows:

“Q Then, did you discard it?

A For the next box I did.

Q Why?

A Because it was sufficiently long, that is sufficiently long enough, and I questioned its safety.

Q Why did you question its safety?

A It looked rather frail.

Q And what did you do for a ladder?

A I made up another one.” (Record p. 102.)

After Filer had discarded this short ladder, for the reason just stated, and late in the afternoon upon the day before the accident McCartney and the plaintiff, who were working together, desired a longer ladder than was available. One Smith, who was a foreman for the company and who at that time had under his supervision several pieces of work in dif-

ferent parts of the city (Record p. 32) happened at the place where the plaintiff was working. Some one told Smith that a longer ladder than was at hand was required. He directed whomever asked him to splice together some of their short pieces, there being five short pieces of ladder at the place. (Record p. 33.) The plaintiff and McCartney thereupon proceeded to splice the two pieces of ladder, the shorter one of which was the 6-foot piece which Filer had secured and discarded as aforesaid (Record p. 102), and in this way the ladder was made up, which has been caused to be introduced as an exhibit in this case and which will be before this court. McCartney and the plaintiff were some half hour in splicing the ladder (Record p. 93) and did not make use of it until the next morning, when the plaintiff going to work at 8 o'clock placed the spliced ladder against the wall and worked upon it for about an hour and a half, when he ascended so as to stand upon the second round from the top of the upper portion of the ladder, holding in his hand a portion of a heavy cable which added greatly to his weight. The rung upon which he was standing broke underneath him, precipitating him to the stone pavement, resulting in the injury complained of. Inasmuch as the ladder itself will be before this court as it was before the lower court, a description of it is not necessary. It is claimed that it was defective because the rung which broke was cross-grained; and upon the trial plaintiff predicated his claim of negligence upon the contention that the grain of the rung presented

a defect which the foreman, Mr. Smith, should have discovered but of which he was not aware. The plaintiff, however, said:

“Q Mr. Smith was your foreman?

A Yes, sir.

Q He couldn't have told it was cross-grained by looking at it before, could he?

A Not by just glancing at it, no, sir.

Q He couldn't have told by looking at it closer, could he?

A If he had got right down close and been looking for a cross-grain he would have found it, yes.

Q Now, explain that, you think he could have told—you think Smith could have told so as to have kept you off the ladder if he had gotten down close to it and looked at it closer?

A He could; yes. The same as one of those others were cross-grained, and he didn't know it.”
(Record p. 93.)

McMellon, a witness for plaintiff, testified:

“Q Now, how close an inspection would it have required to see that this rung which broke was cross-grained?

A Well, I imagine it would have taken a careful examination of it before the accident.

Q How do you mean, how careful?

A Well, if a man got right down and probably examined the wood real carefully and close he could have noticed it.

Q Suppose Smith had examined it to determine whether it was cross-grained or not, what would he have had to have done, would he have had to scrape the timber?

A I think not.

Q He wouldn't had to have done that?

A No.

Q Would he have had to use a magnifying glass?

A I wouldn't judge he would have.

Q You mean to say Smith could have seen it with his naked eye if he had just taken the ladder in his hand and looked at it?

A I think he could, yes, if he had looked at it closely.

Q How long would it have taken him to do that?

A I shouldn't judge it would have taken very long.

Q Could he have done it in an instant?

A No, I think no.

Q He wouldn't have had to cut into the grain or anything of that kind?

A It wouldn't have taken him very long to examine the one rung.

Q He wouldn't have had to scrape the timber or cut into it at all?

A I think not. I don't know. He might have." (Record pp. 64-65.)

It is undisputed that neither portion of the ladder from which plaintiff fell was furnished by the company, the plaintiff testifying as follows:

"Q In other words, the company did not furnish either one of those pieces?

A No.

Q Filer and McCartney, two men who were working in the same capacity you were, were they—

A Yes, sir.

Q Went and got them somewhere?

A Yes, sir." (Record p. 95.)

SPECIFICATION OF ERRORS

The following errors are specified:

First: That the said court adjudged that the plaintiff should recover the sum of \$8,000 against the said defendant.

Second: The court erred in adjudging that the said plaintiff should recover of and from the defendant any sum at all.

Third: The court erred in denying the challenge of the defendant to the sufficiency of the testimony.

Fourth: The court erred in overruling the motion of the defendant to enter judgment for the said defendant.

Fifth: The court erred in overruling the motion of the defendant to direct a verdict for said defendant.

Sixth: The court erred in not holding as a matter of law that the plaintiff was guilty of contributory negligence.

Seventh: The court erred in not holding as a matter of law that the plaintiff assumed any risk or peril attending the use of appliance which caused the injury.

Eighth: The court erred in overruling the motion of the defendant for a new trial.

Ninth: The court erred in rendering the judgment in favor of said plaintiff and against said defendant and in rendering any judgment in favor of said plaintiff and against said defendant.

ARGUMENT

It will be observed from our specifications of error that the sole question intended to be presented

is whether or not the plaintiff below is entitled as a matter of law to not recover in this action. We contend that the case should have been withdrawn from the jury and judgment entered for the defendant and for the following reasons:

The rule which imposes liability upon an employer who furnishes unsafe appliances has no application here because the company did not furnish the appliance but the same was selected by the plaintiff and his fellow-servants.

As before stated, the two pieces of ladder were secured by McCartney and Filer. These men, as well as Smith, the so-called foreman, were fellow-servants of the plaintiff below.

Baltimore & Ohio Railroad Company v. Baugh, 149 U. S. 368.

American Bridge Co. v. Seeds (C. C. A., Eighth Circuit), 144 Fed. 605; and see authorities therein cited.

Ryan et al. v. Smith et al. (C. C. A., Ninth Circuit), 85 Fed. 758.

Armour v. Hahn, 111 U. S. 313.

Whatever may be said as to the propriety of the custom, it was agreed by all the witnesses that it was the general rule that when ladders were not at hand the installers should go out and procure them for themselves wherever they could. The plaintiff below accepted and remained in his employment for four years with knowledge of this rule and under this arrangement and he, therefore, assumed any risk

which might attend the inability of himself or fellow-servants to secure the proper kind of ladder.

The distinction is well recognized between those cases where the master undertakes to furnish the appliances and those where the servants secure them for themselves. It is stated in *Shearman & Redfield on Negligence* (Fifth Edition) §195, as follows:

“An important distinction is taken between instrumentalities which the master undertakes to furnish for the servants’ use and those which he employs the servants to furnish for themselves and their fellow-servants in the same work. Negligence in making the former is the master’s negligence, but negligence about the latter is the negligence of a fellow-servant.”

We find the rule illustrated in a large number of cases known as the “scaffold cases,” where the principle is familiar, that if the master places his servant to work upon a scaffold which the master has left unsafe there is a liability, but if upon the other hand the master has permitted a servant and his fellows to construct their scaffolding for themselves there is no liability. It is submitted that the principle underlying this line of cases is directly analogous to the principle which must control the case at bar. It was a part of the implied contract under which the plaintiff below had been working for four years, that in the event sufficient ladders were not at hand he and his fellows would borrow or manufacture a ladder for themselves; and in this particular instance two of plaintiff’s fellow-servants secured the pieces

which plaintiff and a co-servant manufactured into one ladder by splicing them together.

In *Burns v. Sennett* (Cal.) 33 Pac. 918, the rule is well stated as follows:

“While the general rule is as above stated, still it is well established that the rule does not apply to a case where several persons are employed to do certain work, and by the contract of employment, either express or implied, the employes are to adjust the appliances by which the work is to be done. For instance, if several men are employed to paint a building, or to do some work upon it which requires scaffolding, or some other temporary structure or appliance to support the workmen, the employer to furnish the materials and the employed to construct or adjust the scaffolding or other appliance, the employer is not liable to one of the employes for the careless act of another employe done in the construction, adjustment, or maintenance of the structure or appliance.”

Discrepancies have arisen in the decisions of various courts, and many grotesque announcements have been made because of the failure to properly distinguish whether an employe, through whose negligence in the selection of appliances an injury happens, is acting for the master or for himself and those engaged in the common employment.

One class of cases is those where the master, assuming the duty to furnish safe appliances, delegates that duty to a servant who negligently performs it. In such class of cases there is a liability upon the master; but an entirely different class of cases is those where the servant undertakes as an incident

of his employment to furnish, make or repair, either alone or by cooperation with his fellows, the tools and appliances which he uses. In this class of cases there is no liability, and it is to this latter class the present case belongs, because the master did not undertake to furnish ladders but required the plaintiff below and those working with him to secure their own ladders, as an incident of their work.

The distinction above referred to is well stated by the New Jersey court in *Ingebregtsen v. Nord Deutscher Lloyd Steamship Co.*, 31 Atl. 619, as follows:

“On this topic a rational distinction would seem to be that, when the employe’s duty to inspect or repair the apparatus is incidental to his duty to use the apparatus in the common employment, then he is not intrusted with the master’s duty to his fellow-servant, and the master is not responsible to his fellow-servant for his fault, but that, if the master has cast a duty of inspection or repair upon an employe who is not engaged in using the apparatus in a common employment with his fellow-servant, then that employe, in that duty, represents the master, and the master is chargeable with his default. This distinction is noticeable in *McAndrews v. Burns*, 39 N. J. Law 117; *Smith v. Iron Co.*, 42 N. J. Law 467; *Collyer v. Railroad Co.*, 49 N.J. Law 59, 69, 6 Atl.437; *Ross v. Walker* (Pa. Sup.) 21 Atl. 157; *Moynihan v. Hills Co.*, 146 Mass. 586, 16 N. E. 574; *Daley v. Railroad Co.*, 147 Mass. 101, 16 N. E. 690, and many other cases.”

The rule as to scaffolding and platforms which is generally accepted, and we believe not departed from by respectable authority, is stated in *Shearman &*

Redfield on Negligence (Fifth Edition), §195, as follows:

“If a servant is engaged to work upon a scaffold or platform, ready made, the master is held responsible for personal care to make it a safe place on which to work. But if a number of associated servants are employed to make the scaffold or *other standing place*, as well as to use it when made, the master is no further responsible for negligence in its making than he is for negligence in work done upon it, when made.” (Italics ours.)

We respectfully submit that the analogy of our case to those referred to in the text just quoted requires that it fall under the same rule.

Until we have adopted the rule that compensation by the employer to the employe shall in any case follow an injury, we must recognize the impropriety of permitting a recovery in a case of this character. When a master permits his employe to select his own appliance for use by himself and his fellows and he selects an unsafe appliance, justice, as it has been defined by rules which have heretofore been in vogue and which must govern the determination of the present case, would not seem to require compensation on the part of the master for an injury which was clearly the fault of the servant who made the selection. It may be determined that the general welfare of society requires that compensation be made in all cases of injury regardless of where the fault is located, but until such a rule has been enacted into law we respectfully submit that for the

reason above suggested, if for not other, a recovery may not be permitted in this case.

Under the adjudicated cases recovery is not permitted because of an accident occasioned by the use of as simple an appliance as a ladder.

It is generally held that the rule of employers' liability applicable to complicated and dangerous machinery does not apply to simple implements.

See

McMillan v. Minetto Shade Cloth Co., 117 N. Y. Sup. 1082.

Hart v. Village of Clinton, 100 N. Y. Sup. 1092.

Smith v. Fuel Co., 108 N. Y. Sup. 45.

The case of *Marsh v. Chickering* from the New York Court of Appeals, 5 N. E. 56, is the leading case upon this subject, the controversy there being as to whether or not liability could be imposed upon the master for an accident which happened because of a defective ladder. The court said:

“In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used, and no materials furnished, the use of which requires the exercise of great skill and care, it can scarcely be claimed that a defective instrument or tool furnished by the master, of which the employe has full knowledge and comprehension, can be regarded as making out a case of liability within the rule laid down. A common laborer who uses agricultural implements while at work upon a farm or in a garden, or one who is employed in any service not requiring great skill and judgment, and

who uses the ordinary tools employed in such work, to which he is accustomed, and in regard to which he has perfect knowledge, can hardly be said to have a claim against his employer for negligence, if, in using a utensil which he knows to be defective, he is accidentally injured. It does not rest with the servant to say that the master has superior knowledge, and has thereby imposed upon him. He fully comprehended that the spade or the hoe or the ladder, or the instrument which he employed was not perfect, and if he was thereby injured it was by reason of his own fault and negligence. The fact that he notified the master of the defect, and asked for another instrument, and the master promised to furnish the same, in such a case, does not render the master responsible if an accident occurs.

“We have referred to no adjudicated case which upholds the liability of a party under circumstances of the same character as those presented by the evidence here. A rule imposing such a liability would be far reaching, and would extend the principle stated to many of the vocations of life for which it was never intended. It is one of a just and salutary character, designed for the benefit of employes engaged in work where machinery and materials are used of which they can have but little knowledge, and not for those engaged in ordinary labor, which only requires the use of implements with which they are entirely familiar. The plaintiff was of the latter class of laborers, and the work in which he was engaged was not of a character which would entitle him to the protection of the principle referred to.”

This has been cited with approval in the following cases from other courts:

American Car & Foundry Co. v. Nachand, 93 N. E. 1083.

Cole v. Spokane Gas & Fuel Co., 119 Pac. 831.

St. Louis & S. F. R. Co. v. Mayne, 127 Pac. 476.

Rahm v. Chicago, R. I. & P. Ry. Co., 108 S. W. 572.

Gulf C. & S. F. R. Co. v. Larkin, 82 S. W. 1026.

Rogers v. Galveston City R. Co., 13 S. W. 541.

Longpre v. Big Blackfoot Milling Co., 99 Pac. 131.

Higgins v. Southern Pac. Co., 72 Pac. 690.

Patnode v. Harter et al., 21 Pac. 679.

Meyer v. Ladewig, 110 N. W. 419.

Mattson v. Minnesota & N. W. R. Co., 108 N. W. 517.

Lynn v. Glucose Sugar Refining Co., 104 N. W. 577.

Wachsmuth v. Shaw Electric Crane Co., 76 N. W. 497.

Corcoran v. Milwaukee Gas-Light Co., 51 N. W. 328.

Tompkins v. Marine Engine & Mach. Co., 58 Atl. 393.

Westinghouse Electric & Mfg. Co. v. Heimlich, 127 Fed. 92.

Gowen v. Harley, 56 Fed. 975.

In the case of *Borden v. Daisy Roller-Mill Co.*, 74 N. W. 91, the Supreme Court of Wisconsin said:

“A ladder is one of the most simple contrivances in general use. The danger attending such use is a matter of almost common knowledge, and is particularly within the knowledge of men engaged in such

work as that in which plaintiff was employed when injured.”

This language is quoted with approval in *Sheridan v. Gorham Mfg. Co.* (R. I.), 66 Atl. 576; *Soderburg v. Wells*, 57 Wash. 281; and *Deaton v. Abrams*, 60 Wash. 1.

In the case of *Cahill v. Hilton*, 13 N. E. 339, the Court of Appeals of New York used the following language, the pertinency of which will readily appear when we bear in mind that the plaintiff below in the case at bar had the ladder under his intimate inspection during the half hour it took him to splice it and during the hour and a half while he was working upon it in the morning before his injury:

“The evidence of the defects in the ladder was furnished mainly by the plaintiff’s co-servants, and they were evidently aware of the difficulty of the problem their evidence was designed to elucidate, viz., to show that the defects were so apparent that the defendants were chargeable with negligence for not observing them, but that they were also so obscure that the plaintiff, who was in the frequent use of the ladder, was excusable in not seeing them. The plaintiff’s means of discovering these defects, if there were any, were quite equal to those of any of his witnesses; but the jury were permitted to find, upon such evidence, that the defendants were chargeable with negligence for not discovering and remedying them, and that the plaintiff, with superior means of observation, was ignorant of their existence. It is difficult to see upon what principle of logic or reason such a verdict can be supported. A ladder, like a spade or hoe, is an implement of simple structure, presenting no complicated question of power, motion, or construction, and intelligible in all of its

parts to the dullest intellect. No reason can be perceived why the plaintiff, brought into daily contact with the tools used by him, as he was, should not be held chargeable, equally with the defendants, with knowledge of their imperfections."

This case is cited with approval in *Cole v. Spokane Gas & Fuel Co.*, 66 Wash. 393-395.

In *McGrath v. Walsh*, 4 N. Y. Sup. 705, the plaintiff was injured by the turning of a rung of the ladder under his feet. He based his claim for damages upon the allegation that the defendant had furnished him a defective ladder. He testified that he had gone up and down the ladder many times before but had never discovered the defect. The court said:

"The effect of this testimony is certainly to establish either that there was no original defect in the ladder discoverable upon inspection, or that, if such defect existed, plaintiff elected to go on working upon it with knowledge thereof. Taking either horn of this dilemma, I think the defendants were entitled to judgment. If there was any patent defect, the rule laid down in *Cahill v. Hilton*, *supra*, makes it incumbent upon the servant, equally as upon the master, to examine the ladder and discover the same; and failure to make such examination and discovery on the servant's part would therefore be contributory negligence. If, on the other hand, the alleged defect in the construction of the ladder was an occult one, which could not have been discovered by inspection, the master was not guilty of negligence."

In *Henggler v. Cohn*, 52 Atl. 280, the Supreme Court of New Jersey said:

"The cause of the accident was the breaking of a hinge which connected two parts of a ladder together.

Assuming the fact to be, as plaintiff contended, that the hinge was unsafe, and the ladder dangerous on this account, this condition would have been perfectly obvious to the plaintiff upon inspection, unless it was due to a latent defect which the master himself could not have ascertained by an inspection on his part."

In the case of *Jenney Electric Light & Power Co. v. Murphy*, 18 N. E. 30, the court said:

"In the present case, as we have seen, the plaintiff was of mature age, and of average mental capacity. An implement less complicated or more easily comprehended than a 12- or 14-foot ladder can hardly be conceived of; and the consequence of going upon one in the defective condition of that described, unless with extreme caution, must be within the comprehension of every adult person of ordinary intelligence. While it is true that the appellee and the other workmen were directed by the foreman to use the defective ladder in accomplishing a particular end, yet the manner of using it, and the precautions which they should or might take in using it, so as to avoid injury, were left to their own discretion."

This statement has peculiar application in view of the contention which the defendant in error will make, that he was directed by the foreman to splice and use the ladder which caused the accident.

In the case of *Meador v. Lake Shore & M. S. Ry. Co.* (Indiana), 37 N. E. 721, the court would not permit a recovery for an accident happening by reason of a defect in a ladder though the servant had notified the master of such defect, saying:

"No contrivance could be simpler in its construction than this 5-foot ladder,—not even a hoe, an axe,

or a spade. Appellant had at least equal knowledge with the company as to the nature and condition of the ladder. The right of the plaintiff to maintain this action is founded upon the negligence of the defendant in not furnishing a proper ladder for the use of the plaintiff in the work he was engaged to perform. It rests upon the principle that it is the duty of the master to the servant, and the implied contract between them, that the master shall furnish sufficient properly constructed and safe machinery, or other materials and appliances, to be used in the course of his employment, and necessary for the service. As a general rule, it may be assumed that the master, who employs a servant, has a better and more comprehensive knowledge of the machinery and materials to be used than the employe, who has claims for his protection against the use of defective, inadequate, or improper machinery, materials, or appliances while engaged in the performance of the service required of him. The rule stated, however, is not applicable in all cases. Where the servant has equal knowledge with the master as to the machinery used or the means employed in the performance of the work he is required to perform, and a full knowledge of the existing defects, it does not necessarily follow that the master is liable for injuries sustained by reason of the use thereof."

In *McGill v. Cleveland & S. W. Traction Co.* (Ohio), 86 N. E. 989, a recovery was sought because of an injury from a defective ladder, the master having promised to repair the defect. The court said:

"The law requires masters to exercise ordinary care to provide reasonably safe tools and appliances for their servants. But the foregoing rule has no application where the servant possesses ordinary intelligence and knowledge, and the tools and appliances furnished are of a simple nature, easily understood, and in which defects can be readily observed by such servant."

The Supreme Court of the State of Washington has recognized and applied the same rule with regard to a simple instrumentality. In the case of *Cole v. Spokane Gas & Fuel Co.*, 66 Wash. 393, the court said:

“The master could have no more knowledge of such a defect (absence of rivets in handle of wheelbarrow) than the servant possessed, for the instrumentality was so simple that it was the duty of the servant to know its condition, and either call the attention of the master to it or protect himself against the possibility of injury. The rule seems well established that an implement of simple structure, presenting no complicated question of power, motion or construction, and intelligible in all of its parts to the dumbest intellect, does not come within the rule of safe instrumentalities, for there is no reason known to the law why a person handling such instrument and brought in daily contact with it should not be chargeable equally with the master with a knowledge of its defects.”

Citations might be multiplied at far greater length to establish this contention. We believe the adjudicated cases which are well considered have established the rule that a servant is entitled to rely upon the assumption of supervision and inspection by his master when he is put to work with any complicated tool or machinery, and this is true even though the servant is equally skilled and has equal opportunities of discovering a defect; but when the appliances with which the servant works are as simple as are cross pieces nailed upon two uprights constituting a ladder, the servant has no right to trust blindly upon any such assumption.

The plaintiff below assumed the risk of the frailty of the ladder and was guilty of contributory negligence in using it as he did.

The ladder with the broken rung will be before the court so that an opportunity will be given, without a description here, to observe its flimsiness. Upon this piece of wood, perhaps a half inch in thickness, fastened with two small brads, plaintiff placed his weight of one hundred sixty pounds, which was augmented by a cable carrying an hundred wires (Record p. 29) which he was holding and he did this without testing its security. We do not believe the conclusion can be escaped that he was not only careless but foolhardy in the extreme.

He complains now because the rung or cross piece was cross-grained. Cross- or straight-grained the result would probably have been the same, for it would seem apparent to any man of ordinary intelligence that this cross piece was incapable of bearing such a weight. Yet, that the piece of wood that constituted the rung was cross-grained he could have noticed by a moment's observation, as appears from that portion of the testimony which we have quoted in our statement. So manifestly flimsy was the ladder that Filer, who was using the short 6-foot end the night before, discarded it on that account and built himself a ladder of his own. (Record p. 102.)

Recognizing without dispute the rule that contributory negligence and assumption of risk is ordinarily a question for the jury, we nevertheless are

convinced that in this particular case the undisputed testimony clearly established that the plaintiff below assumed any risk which existed and by his negligence contributed to the injury, that there is no question for the jury to decide.

In the case of *Flaherty v. The Truro*, 31 Fed. 158, the question was as to the negligence of a libelant who failed to appreciate the insecurity of a batten upon a ladder. Judge Benedict said:

“As to the security of the fastening of the batten at the time the libelant used it, he was as well able to judge as the ship’s owner. Any defect in the nailing that would have appeared to any one would have been as apparent to the libelant as to the ship’s owner. If the ship’s owner is chargeable with knowledge of the insecure condition of the batten, the libelant, who used the ladder, is chargeable with the same knowledge. No person is justified in trusting himself upon a ladder without giving it that reasonable scrutiny which any person of ordinary intelligence about to use such a structure would naturally give it. If the libelant had scrutinized the batten to any considerable degree before trusting to it, he would have learned that it was insecure, and would have put his hands on the sides of the ladder, instead of on the batten, and so reached the hold in safety. His failure so to scrutinize the batten before trusting to it was negligence.”

Nor may the plaintiff below absolve himself of the charge that he knew or should have appreciated his peril by the assertion that he relied upon the direction of the foreman, Smith, to fasten the short pieces of the ladder together so that they might go upon the wall. Smith had under his superintendence

several other pieces of work and crews of men between whom he was passing from time to time during the day. His notice of what the men were doing or of the character of the appliances they were using was necessarily superficial.

Upon the afternoon of the day before the accident happened when plaintiff and his co-servants spoke to Smith about ladders, saying they had none long enough to reach where they wanted to go, Smith told them to splice some of the short ones together. There were then five short pieces of ladder at this place. Manifestly, the opportunity of Smith to observe the safety or the insufficiency of these pieces of ladder as he passed by was not as good as that of the plaintiff himself. This the plaintiff below knew, and it would be ridiculous to permit him to assert that he used the ladder relying upon the assumption that Smith had vouched for its safety when he himself had manufactured the ladder and if it was defective could have easily observed it.

The plaintiff below failed completely to prove his cause of action.

The plaintiff alleges as the very gist of his cause of action as follows: "That certain ladders had been furnished for said gang of men by the defendant for their use, and plaintiff had nothing to do with the furnishing of said ladders." The proof, however, showed that upon the contrary not the defendant but the plaintiff and his fellow-servants furnished their

own ladders, and the plaintiff actually builded the very ladder upon which he was injured.

In actions for personal injury in order to propose the cause of action at all plaintiff must state the specific acts of negligence relied on. These acts, when alleged, constitute the very gist or gravamen of the action. Unless these acts are proved substantially, the case fails completely. No rule is better settled than that the plaintiff, if he charges specific acts upon which he relies to show negligence, must prove them as charged. To show a different set of facts upon which he relies is an attempt to prove a new and different cause of action. Certainly the charge that the master furnished the servant with defective appliances is one thing, while a case where the master furnished no appliances (the servant furnishing his own) is quite another and a different thing, and proof of one will constitute an entirely different cause of action from the other.

We have in this state a statute common to all the states, reading as follows:

“When, however, the allegation of the cause of action or defense to which the proof is directed is not proved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof.”

Remington & Ballinger's Code, Sec. 301.

It is well to bear in mind the proper meaning of the expression “cause of action.” It is constituted, as Mr. Pomeroy says, of the facts from which the

plaintiff's primary right has arisen and the facts constituting the defendant's delict or act of wrong. (*Pomeroy's Remedies and Remedial Rights*, 2nd Ed. Sec. 453.)

Manifestly if this definition is followed, if there be a change in the acts constituting the defendant's delict, there is a difference in the cause of action.

Says Mr. Pomeroy, Sec. 554:

"The very object and design of all pleading by the plaintiff, and of all pleading of new matter by the defendant, is that the adverse party may be informed of the real cause of action or defense relied upon by the pleader, and may thus have an opportunity of meeting and defeating it if possible at the trial. Unless the petition or complaint on the one hand, and the answer on the other, fully and fairly accomplishes this purpose, the pleading would be a useless ceremony, productive only of delay, and the parties might better be permitted to state their demands orally before the court at the time of the trial. The requirement, therefore, that the cause of action or the affirmative defence must be stated as it actually is, and that the proofs must establish it as stated, is involved in the very theory of pleading."

The author, after remarking that it would be arbitrary and technical to impose a penalty for a mere variance, continues:

"Finally, if the divergence is total, that is if it extends to such an important fact, or group of facts, that the cause of action or defense as proved would be another than that set up in the pleadings, there is plainly no room for amendment, and a dismissal of the complaint or rejection of the defense is the only equitable result. It should be noticed that, in order to constitute this total failure of proof, it is not nec-

essary for the discrepancy to include and affect each one of the averments."

(See 31 *Cyc.* 674, 686.)

The Supreme Court of our state has applied the statute quoted to the following facts in the case of *Albin v. Seattle Electric Co.*, 40 Wash. 51. In that case plaintiff alleged that defendant started its car in motion while he was alighting, but his proof was that the car had not stopped. The court said:

"If the facts constituting negligence are specifically alleged, the pleader, in presenting his evidence, should be limited to proof of such facts, otherwise there would be a variance to the prejudice of the opposite party."

In *Higgins v. Mayor, etc. of Wilmington* (Dela.), 51 Atl. 1, plaintiff alleged that because of an excavation in the street he was hurled from a wagon and injured. He proved that, fearing the wagon was going against a tree because of the excavation, he jumped out. It was held a fatal variance for which no recovery could be had.

In *Waldhier v. The Hannibal & St. Jos. R. R. Co.*, 71 Mo. 514, plaintiff charged defendant with negligence in using defective machinery in running its cars. Proof showed a defect in the track, but no other negligence. This was held a complete failure of proof, which precluded recovery.

See also *Chun v. Kentucky, etc. Co.'s Receivers* (Ky.), 64 S. W. 649.

In *St. Louis, etc. Ry Co. v. State* (Ark.), 26 S.

W. 824, plaintiff alleged defendant's failure to ring a bell on a passenger train going south. This was held to be a total divergence, precluding recovery.

See *Pennington v. Detroit, etc., Ry. Co.*, 51 N. W. 634.

Mr. Thompson, an author who cannot be said to be wedded to technical rules which will operate against the right of plaintiff to recover for personal injuries, in his work on *Negligence*, Vol. 6, Sec. 7471, says:

"In actions for damages for negligence the *allegata* and *probata* must correspond * * * But where he (plaintiff) avers that the negligence of defendant consisted in one thing, and then proves negligence consisting in something else, he ought not to be allowed to recover."

See also

Santa Fe, etc., Ry. Co. v. Hurley (Ariz.), 36 Pac. 216.

Woodward v. O. R. & N. Co. (Ore.), 22 Pac. 1076.

Chi. & E. I. R. Co. v. Driscoll (Ill.), 52 N. E. 921.

Carter v. Kansas City, etc., R. Co. (Ia.), 21 N. W. 607.

Patterson v. Westchester Ry. Co., 49 N. Y. S. 796.

Coleman v. Metropolitan St. Ry. Co., 81 N. Y. S. 836.

T. W. & W. Ry. Co. v. Foss, 88 Ill. 551.

In *East Tennessee Coal Co. v. Daniel*, 42 S. W.

1062, the court held that plaintiff must confine his proof to the negligence alleged, and that defendant was not precluded from objecting to the divergence because he had not objected to the testimony. The court says:

“The question of insufficiency of hands was not the subject of direct proof, but was, rather, an inference to be deduced from the nature and character of the work to be performed. * * * It would have been difficult for the defendant to interpose such specific objection as would have eliminated this question from the proof.”

We will not be found contending for any narrow technical rule which shall require a party to make each item of his proof correspond with his allegation, but we do assert that when a party alleges facts constituting a cause of action he is not entitled to a recovery upon proof of facts diametrically different, and indeed irreconcilable with those which he has pleaded.

Had the plaintiff below alleged the actual facts in his complaint, he could not, as we believe we have hereinbefore demonstrated, have gotten by a demurrer. Conceding the widest liberality, we contend that proper practice does not permit a recovery in this case because of the failure of the plaintiff to prove the cause of action alleged.

For the reasons above suggested we respectfully submit the judgment should be reversed.

PILLSBURY, MADISON & SUTRO,
HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Plaintiff in Error.

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a corporation,

Plaintiff in Error,

v.

FRANK STARR,

Defendant in Error.

No. 2242

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN DI-
VISION.

Brief of Defendant in Error

PRELIMINARY STATEMENT.

Owing to a limitation of time we have been compelled to prepare this brief in advance of the receipt of the printed brief of Plaintiff in Error. Through the courtesy of its counsel, we have been furnished, in advance of publication, with a copy

of their manuscript, which, however, was completed after much of the work of the preparation of this brief had necessarily been done. Some of the authorities which are cited therein cannot be discussed in detail in the circumstances, but the general principles involved can be dealt with herein.

STATEMENT OF THE CASE.

In a general way we have no criticism to offer to the statement of the case contained in the brief of Plaintiff in Error. There are certain additions which we deem it necessary to make thereto in order that the particular theory of the Defendant in Error may be made plain to the court.

Though it is of no particular importance it may be well to say that the cable was being strung upon the building at the place of the accident at a height of about 25 feet (Record, page 25) instead of 20 feet, as stated in our complaint and in the brief of Defendant in Error.

It is inaccurate to say that the company permitted the installers to secure their own ladders. This may become an important question in this case and therefore in addition to the testimony set forth in the opening brief, we quote, as follows:

From the testimony of George E. Smith, Foreman:

“Q. Now, by whom were the ladders supplied

for the use of the construction men, whose business was it?

A. The majority of them were supplied by the Telephone Co.

Q. How were they supplied, through whom? Through you or to the men individually?

A. Well, as a general thing, I got the ladders, that is when they were telephone ladders.

Q. Was it always possible to get a sufficient number of ladders from the Telephone Co?

A. No, sir.

Q. In that emergency what were you accustomed to do?

A. If I was right around there, I always told them to go borrow them, go get them.

Q. How many men can use a single ladder in the work which you were superintending?

A. Sometimes there is only one man, but when we are out in the street that way, around buildings, there is always two." (Rec., pp. 22-23.)

From the testimony of Thomas McCartney:

"Q. What was the understanding as to who should provide ladders whether the company or the men, whose business was it to provide the ladders?

A. It was the Company's." (Rec., p. 38.)
From the testimony of Witness R. D. McMellon?

"Q. Who undertook to furnish the ladders that were used by the men employed by the company?

A. The company was supposed to furnish them.

Q. Through whom did they furnish them?

A. Through the foreman.

Q. Did they always supply a sufficient number?

A. They didn't at any time prior to the accident.

A. No.

Q. From time to time they didn't supply enough?

A. Never that I knew of.

Q. Now, when a job required a larger number of ladders than the company supplied, what, if any, directions were given by the foreman?

A. The foreman directed us to borrow ladders wherever we could get them, as a rule." (Record, p. 57.)

From testimony of the witness J. W. Werner:

"Q. Who was supposed to furnish the ladders, the company, or the men?

A. The Company." (Record, p. 67.)

From the testimony of C. F. Dalton:

"Q. Who was supposed to furnish the ladders for the use of the men?

A. The Company was.

Q. Did they always furnish a sufficient number?

A. No, sir, not when we were in the gang.

Q. When the number of ladders on the job was insufficient, what did the foreman do?

A. If he couldn't procure them, he would tell us to rustle them, get them any way we could."

From the testimony of plaintiff, Starr:

"Q. Who was supposed to furnish the ladders for use in this work that you were doing?

A. The Company." Record, p. 84.)

From testimony of defendant's witness, Filer:

"Q. The Company was supposed to furnish these ladders?

A. Yes, they were supposed to furnish ladders." (Record, p. 100.)

Reference is made in the opening brief to the testimony of defendant's witness, Filer, to the effect that he discarded the ladder which broke because he considered it frail.

We add to his testimony as quoted, the following, from page 103 of the Record:

"Q. Did you notice the cross-grain of that?

A. No, I didn't notice the cross-grain.

Q. But it looked like a frail ladder?

A. It looked like a frail ladder.

Q. Did you call the attention of the boys work-

ing on the job to your having discarded it, or the reason you did it?

A. I don't recollect that I did." (Record, p. 103.)

With respect of the direction of the foreman Smith to the men, to splice together the Filer and McCartney ladders, it is said in the opening brief that Smith "happened at the place where plaintiff was working." Since a point is made of this later in the brief it might be well to quote the testimony of the foreman appearing on page 33 of the record:

"Q. How much time did you spend at this job on Post St?

A. Well, along there. I used to go along there possibly four or five times a day.

Q. Just passed by there and observed the work and gave what directions you thought necessary and go on to some other place?

A. Yes, sir.

Q. You didn't linger there and take a hand in the work? That is what I am getting at.

A. *Like in putting the cable up, whenever they were stringing a cable I was always right there."*

It is said that some one told Smith that a longer ladder was required, and that he directed whoever asked him to splice together some of their short pieces, *there being five short pieces of ladder at the place.*

The conversation was with the men in the gang.
(Record, p. 28.)

“ * * * S., I told them to splice them two ladders together and use them. I don’t know as I said two ladders. I said, “Splice them ladders together and use them.”

“Q. There was just these other two short ladders on the ground besides this long ladder?

A. Yes, sir.” (Record, p. 28.)

From the testimony of the same witness, we quote:

“Q. Now, did you point out the particular ladders they were to splice together, or did you just say, ‘Splice two of your short ones together?’

A. Well, there were only just the two short ones that were there, that they did splice together.”
(Record, p. 34.)

On re-direct, he said:

“Q. I understand you that two of the pieces of ladder that you referred to were the two pieces of the company ladder?

A. Yes, sir.

Q. That was an extension ladder?

A. Yes, sir.

Q. And was in pieces, that is, they could be separated?

A. Yes, sir.

Q. Now, were they being used as one ladder on that job?

A. On that job; yes, sir.

Q. Would either piece of it, separately, be sufficient to do the work of the height that that cable was being put up?

A. No, sir.

Q. Now, two of the other pieces were the ones you have already testified to, as having been borrowed by McCarthy and Filer?

A. Yes, sir.

Q. What was this other one?

A. The other one was the one Filer was using.

Q. He was using that?

A. Yes, sir.

Q. When these other people spoke about wanting another ladder, you referred to what ones when you told them?

A. Why, the ones that they had spliced together.

Q. Those were the ones you referred to?

A. Yes, sir.

Q. Told them to splice them together and go up on them?

A. Yes."

On this point McCarthy testifies, as follows:

“Q. Before recess was taken this morning, you stated that on the afternoon before the morning of the 15 of Sept., 1911, the foreman was at the place of work, and in response to a request for ladders, he said to splice together the ladders you had, and there were just these two pieces which could be spliced together?

A. Yes, sir.” (Record, p. 45.)

In the opening brief it is said that when Starr went upon the ladder he held a portion of a heavy cable which added greatly to his weight. The testimony shows, (Record, p. 47), that the end of the cable was 13 feet long, and that it would go possibly three-quarters of a pound to a foot, (Record, p. 29), so that the added weight was approximately five pounds.

Some of the testimony of plaintiff and of his witness McMellon is quoted upon the question whether Smith, the foreman, should have discovered the cross-grained rung. As the character of the defect is of the greatest importance we shall quote more at length from the testimony of the various witnesses.

Our contention is that the evidence shows that the defect was one not obvious to ordinary observation by one using the ladder; that cross-grained rungs are seldom used in a ladder, so that there would be nothing to put the servant upon his guard, and that such a danger is not one of the ordinary dangers encountered in the use of a lad-

der; but that this condition could have been discovered by a proper inspection by the master. The Filer ladder, so-called, was the one which broke, and the testimony hereafter quoted is limited to that portion of the spliced ladder alone.

In order to demonstrate these propositions, we quote as follows:

Plaintiff, Frank Starr, testified:

“Q. You saw it though on the job?

A. I saw it, glanced at it.

Q. Did such observation as you gave to the ladders, or either of them, disclose any danger about them?

A. No sir, I thought they was perfectly safe.”
(Record, p. 85.) * * *

“Q. Did you at any time before your accident know that there wasn't a cross-grained step in either of these ladders?

A. No, sir.

Q. How long were you accustomed to work with ladders?

A. About four years.

Q. Is it common for rungs of ladders to be made of cross-grained pieces of wood?

A. No sir, it is not.

Q. Would you say that this was rare or only occasionally?

A. It is very seldom you will find them.

Q. Is such a rung safe for men to go up on?

A. No, sir, it isn't safe.

Q. If you had known that there was a cross-grained rung there would you have gone up on it?

A. No, sir, I wouldn't." (Record, pp. 86, 87.)

Foreman Smith testified as follows:

"Q. I will ask you to state whether or not cross-grained sticks are usually used for rounds of ladders.

A. No, sir, they are not.

Q. Would you say that their use is very seldom?

A. Yes, sir." (Record, p. 26.)

"Q. Now, did you observe that there was any cross-grained round in the shorter of these two ladders?

A. No, sir.

"Q. Was the fact that it was cross-grained apparent to just an ordinary observation, such as one gives to a ladder in using it?

A. I didn't quite understand how you got that.

Q. You saw the ladders in use and saw them on the ground?

A. Yes, sir.

Q. Was this cross-grained condition apparent to you, was it apparent to you?

A. No, sir.

Q. Would it be apparent to an ordinary look, if one would look at the ladder, would it be apparent to him, I mean without a special inspection of the round?

A. No, I don't think it would.

Q. Did you make any inspection of either of these ladders?

A. No, sir.

Q. Was there anyone else in direct charge of these men or of the appliances that they were using besides yourself?

A. No, sir." (Record, pp. 28, 29.)

McCartney testified as follows:

"Q. I didn't make myself clear. How long have you worked at work where you had to use ladders—How long have you done that in your lifetime?

A. I have been using ladders for two years—about two and a half years.

Q. Is it customary to make ladders with a round that is cross-grained?

A. No, sir, it isn't.

Q. Is such a ladder safe?

A. No, sir.

Q. What would you say as to whether the use of cross-grained rounds is rare or not, does it happen once in many times?

A. It is rare. (Record, p. 41.)

“Q. You saw this ladder as it was used about there from time to time?

A. Yes, sir.

Q. Did you observe any cross-grained rounds in the ladder before the accident?

A. No, sir.

Q. If there was any cross-grained piece there, was it so apparent that a man in the ordinary use of the ladder would see it?

A. Not that I noticed.

Q. Would such a cross-grained piece be safe to go upon?

A. No, sir.” (Record, p. 42.)

Witness, McMellon, testified as follows:

“Q. Did you see this ladder that was used for the job before the day of the accident?

A. Yes, sir.

Q. What was its color and appearance?

A. It was a dark, weather-beaten ladder, unpainted.

Q. Was it rough or smooth?

A. As near as I can remember it was a rough finished ladder.

Q. Did you, from such observation of it as you made, see any cross-grained rungs in it?

A. No, sir.

Q. How long have you been accustomed to use ladders in the way of business?

A. For the last four or five years.

Q. Is it customary to have rungs, cross-grained rungs, in a ladder?

A. No, sir, it is not.

Q. Is such a rung safe for use?

A. No, it is not, it is unsafe.

Q. You didn't observe, however, that there was any cross-grained rung in this ladder at the time before the accident?

A. No, sir, not before the accident.

Q. Was the fact that it was cross-grained observable then, by the ordinary use of the ladder without a particular inspection?

A. No, sir, it was not." (Record, pp. 59, 60.)

It appears that the the time of the accident this witness was waiting for an opportunity to use the same ladder. (Record, p. 60.)

We cannot agree with Plaintiff in Error in its statement that the ladder was not furnished by the company. Physically, the two parts, which were

afterwards spliced together, were procured by McCartney and Filer. They were made into one ladder at the direction of the Foreman, and the men were by him directed to use it. (Record, pp. 28, 44, 59.)

We shall contend that in the circumstances in which this ladder was furnished it was in law and in fact furnished by the Company.

Other facts will be referred to in our argument.

ARGUMENT.

I.

The first point made by Plaintiff in Error is that the rule which imposes liability upon an employer who furnishes unsafe appliances has no application here, because it is said the company did not furnish the appliance but the same was selected by the defendant in error and his fellow servants.

The rule is well settled that where the master undertakes to furnish the tools and appliances, he is bound to use reasonable care to see that such appliances are reasonably safe for the use intended. This is a non-delegable duty of the master and one who performs it, even though in other respects a fellow servant of the other employees, represents for that purpose the master, and his negligence is the negligence of the master.

4 Thompson on Negligence, Secs. 3949, 3950, 3791, 3792.

Flanigan vs. Guggenheim Smelting Co. 44
Atl. 762.

The record shows that the Company undertook to furnish ladders for the use of the installers; that these ladders were furnished through the foreman only; that when it happened that not enough ladders were furnished by the company the foreman would direct the men to borrow other ladders, and, if he were absent, the men, having their work to do, themselves attempted to borrow them. It was not shown that it was the duty of the men, as a part of their employment, to furnish ladders for themselves, nor that if they failed to do so, in the absence of a sufficient number of company ladders, they would be blamed. Moreover, the McCartney ladder was safe and strong. The Filer ladder, which broke, was sufficient for the purpose for which it was borrowed, namely: for reaching to a cable box six or eight feet high. These ladders were not secured by the men as material for the making of another ladder, but were secured for work which did not require the workmen to go much above the ground. The men had no intention of splicing these ladders together and making a longer one. The record shows that when the foreman came to the place of work the afternoon before the accident the men asked him for company ladders—he being the only source through which such ladders could be procured, and being the servant designated by the company to furnish ladders to the gang—and that he directed that these two par-

ticular ladders should be spliced together to make a longer one. This was an adoption by the company of these shorter ladders as material for the manufacture of a stronger ladder, and an adoption of such longer ladder as an instrumentality of the work, and was the method which it took to supply them with ladders in accordance with its duty. The spliced ladder thereby became the company's ladder, and it assumed responsibility therefor, except as to the splicing which the foreman delegated to McCartney and Starr. If the long ladder had broken at the splice through any defect in workmanship, no doubt the company would not be liable. But the splice held. It was the material which the men did not procure for use in making a longer ladder, but which the foreman did direct them to use, and that gave way.

The authorities cited by Plaintiff in Error, under this subdivision, in no particular upholds its contentions, for the reason that they all contemplate a condition where it is a part of the duty of the servant, under his employment, to furnish his own tools and appliances. As showing this distinction, we call attention to the citation from *Shearman & Redfield on Negligence*, Sec. 195, quoted in its brief. This case falls within the first class there cited, being one in which the master himself undertakes to furnish the instrumentalities for the servant's use, and in which the negligence is that of the master; and not within the second class, where the

servants are employed to furnish them for themselves and their fellow servants.

With reference to the rule in scaffold cases suggested in the brief, we have to say that we consider the rule of such cases analogous to that which applies in this case. The rule, however, is improperly stated, in the brief of Plaintiff in Error, to be that where the master has permitted a servant and his fellows to construct their scaffolding for themselves there is no liability. The rule laid down by the courts is this: That if the master furnish sufficient material of good quality for the use of his servants, and direct them to make the scaffold therefrom, he is not liable if the injury is caused either by their negligent manner of constructing the scaffold, or by their negligently selecting improper material from among that furnished by the master. So, here, if the two ladders which the foreman directed McCartney and Starr to splice had been proper material for the making of a ladder, or, if there had been several short ladders, some of them sufficient and some insufficient, from which the foreman directed the servants to make selection, and they had made an improper selection, and if the accident had occurred either by reason of an insufficient splice, or by reason of the selection by them—negligently and needlessly—of a defective piece, then there could be no recovery here. But, as already pointed out, there were these two ladders alone which could be spliced together. They

were spliced by order of the foreman; the splice did not give way; the injury occurred from a defect in one of the pieces so directed to be used. Under the doctrine of the scaffold cases, plaintiff would be entitled to recover.

The error into which counsel fall is due to the three erroneous assumptions:

1st. That the Servants and not the company engaged to furnish the ladders;

2nd: In assuming that because fellow servants of Starr borrowed these short ladders for work to be done near the ground, they borrowed them for the purpose of being used as material in making a longer ladder;

3rd: That the use of these ladders in making the longer ladder was due to the volition of the servants and not to the command of the foreman; and

To their overlooking the fact that the use to which the spliced ladder was put, and which required the use of the defective rung, was directed by the foreman himself.

All these assumptions are directly contrary to the record as cited in our opening statement; and the direction given by the foreman was shown without contradiction in the record.

It is well settled that, as between the servant and the master, all appliances owned by another,

of such a character and use as would impose the duty of inspection, which the master directs or authorizes his servant to use in the business of the master, stand upon the same footing as those that actually belong to him. If the master is not in position to safe-guard his servants by an inspection of such appliances he must refrain from giving them orders to use them whereby their safety will be imperilled.

This statement is summarized from *DeMaries vs. Jameson*, 108 N. W. 830. As supporting the same rule see 1 Labatt, Master & Servant, Secs. 171, 172.

In *Ralph vs. Am. Bridge Co.* 30 Wash. 500, defendant used as a ladder an inclined beam across which cleats had been nailed by some one not in defendant's employ. The court quoted with approval as follows:

“While appellants used it in their business they furnished it to their employees and it mattered not at all whether they built it themselves or got it by gift of another, or through right of established custom. By whatsoever means they acquired it, they were in any event bound by the duty imposed upon them by the law to exercise a reasonable degree of care for the furnishing of it as a place for their employees to work.”

It was held that the duty of supervision and inspection of such necessary appliances was imposed upon the defendant.

II.

The Second point made in the brief of the Plaintiff in Error is stated as follows:

“Under the adjudicated cases recovery is not permitted because of an accident occasioned by the use of as simple an appliance as a ladder.”

Before considering the particular authorities relied upon by Plaintiff in Error it may be well to advert to the general principles governing this class of cases. In this discussion we shall not cite authorities, because the principles are so well known, and have been so often declared, as to have become the common property of the Bench and Bar of this country.

The duties of the master and servant respectively, so far as they have reference to accidents occurring to the latter, are distinct and separate. This case involves the duty of the master and of the servant with respect of the tools used in the prosecution of the master's business. The master's duty may be said to be as follows:

He is bound to use reasonable care to provide reasonably safe tools and appliances for the servant's use in the doing of the work. This general duty may be subdivided into his duty to furnish tools which are in the first instance reasonably safe, and the duty of inspection of such instrumentalities from time to time to see that the tools remain fit for use. The duty of the servant, on the other hand,

is to work with the tools so furnished him, and to exercise, for his own safety, such care as persons of ordinary prudence similarly situated do exercise. It is never the duty of the servant to inspect such tools unless he be employed for that specific purpose, or unless he have notice of some defect, sufficient to put him on inquiry. The sufficiency of the notice, however, is ordinarily a question of fact.

The master is excused from his duties in but one case, and that is in the case of injury to a servant employed to perform them for the safety of other employees.

It is sometimes loosely said that the master is excused from inspection where the defect causing the injury is latent, and not discoverable by inspection, or where the defect is so obvious that it will be apparent to the servant using the instrumentality. With respect of the first class of cases, it would be more exact to say that the failure to inspect is not excused, but the failure on proper inspection to discover the defect is excused, because of the latent character of the defect. With respect of the second class, the statement is altogether inaccurate. The master is not excused for a failure to inspect the instrumentality because the defect in it is obvious; on the contrary, to permit the use of dangerous instrumentalities, allowed to remain in that condition because of a lack of proper inspection, is negligence on the part of the master, but he is excused from liability because of

the doctrine of the assumption of risk. This doctrine does not dispute the negligence of the master, but raises an affirmative defense in his favor.

As we have said, except in the instances adverted to, no duty of inspection devolves upon the servant. It is his business to work and not to inspect.

There are certain risks which it is said the servant assumes. They are:

1st: Those risks which are inherent in the occupation itself;

2nd: Those risks which are known to the servant, and

3rd: Those risks which are obvious to one situated as the servant is, and which he would know and appreciate in the exercise of ordinary care.

There has latterly grown up what is sometimes referred to as the "common tools doctrine." Counsel for the master sometimes speak of this doctrine as being separate from, or an exception to, the ordinary rules of law to which we have just adverted. On the contrary, the "common tools doctrine" is based upon the very principles already discussed. Roughly speaking this doctrine is that with respect to injuries arising from defects in common tools simple in their nature, *and the risk of injury from which is obvious*, the servant is not entitled to recover. It is not always made plain by the authorities upon the point what the true

basis of this doctrine is, but the vast majority of the cases base the doctrine upon the fact that the danger is obvious, and, therefore, that the risk of injury is assumed. In all those cases in which this reason is not given it appears from the facts stated that the defects were apparent and the risks obvious.

This is no new doctrine. From the very first announcement of the doctrine of assumption of risk it has been understood that a risk which is obvious and apparent to the servant is assumed by him. The reason, and the only reason, for speaking of the common tools doctrine as being applicable to a special class of cases, is that in such cases the defects are usually either so obvious as to give rise to an assumption of risk, or, are of such latent character as not to be discoverable upon inspection. No court has ever attempted, so far as we are aware, to say that merely because a tool is a common or a simple one the defect *in point of law* is obvious, or that the master is not liable for injuries caused by defects therein. In other words: it is not the name of the instrumentality but the circumstances of the injury which determine liability or non-liability.

The question whether or not a defect is obvious and apparent, always depends upon the circumstances of the particular case. Among those circumstances the simplicity of the instrumentality is, of course, an important factor.

It is because the circumstances attending an injury occasioned by a defect in a common tool do so commonly show that defect was obvious and the risk therefore one assumed by the servant, that some persons have been led to the erroneous conclusion that recovery can be had in no case for an injury occasioned by a defect in such an instrumentality.

AUTHORITIES OF PLAINTIFF IN ERROR.

A great many cases have been cited by the Plaintiff in Error in an obvious attempt to deduce a general doctrine of non-liability for injuries from defects in common tools, but the cases so cited, when in point at all, sustain the general observations hereinbefore made. It may be said substantially of all of them that, where the nature of the defect appears in the statement of the case, that defect was an obvious one, and in the most of the cases the courts so state.

We shall not discuss them separately, except the ladder cases. A few of them we have not been able to examine in the time at our disposal. The instruments of injury—except in the ladder cases—were as follows:

Vanderpool vs. Partridge, 13 L. R. A. (N. S.) 668 (Splinter from rasp used as a chisel); *Williams vs. Bunker Hill & S. Mining Co.* 190 Fed. 79 (Injury from trolley wire); *Maki vs. U. P. Coal Co.*, 187 Fed. 389 (Unguarded cog wheels);

Cole vs. Spokane Gas & Fuel Co., 66 Wash. 393 (Pan used for carrying coke; rivets loose in handle); *Deaton vs. Abrams*, 60 Wash. 1 (Fall of pile of 4-foot slabs, 18 feet high); *Soderberg vs. Wells*, 57 Wash. 281 (Brick laid in improper courses); *Wachsmuth vs. Shaw Elec. Co.*, 76 N. W. 497 (Snap hammer); *O'Brien vs. M. K. & T. Ry. Co.* 82 S. W., 319 (Worn out wrenches); *Schulz vs. Johnson*, 7 Wash. 403 (Defective rope used to support a weight to pull back a saw); *Holt vs. C. M. & St. P. Ry. Co.*, 69 N. W. 352 (Pinch bar used to move car); *McMillan vs. Minette Shade Cloth Co.*, 117 N. Y. Sup. 1081 (Board with cleats nailed on it used to smooth rollers); *Sterling Coal & Coke Co. vs. Thorpe*, 131 S. W. 1030 (Shovel with a crack in the grip of the handle); *Chicago B. & Q. Ry. Co. vs. Shalstrom*, 195 Fed. 725 (Giving way of stringer).

In each of these cases the defect was held by the court to be obvious, and in the most of them the servants had made complaint of such defects prior to their injury. It does not require a special doctrine concerning common tools to account for the holding in these cases. The servants could not recover because they assumed the risk of obvious defects.

In some of the cases the principle is laid down that a servant cannot profess ignorance of a danger which a person in his situation could not have failed to perceive and appreciate.

In the *Vanderpool* case, 13 L. R. A. (N. S.) 668, in applying the "common tools" rule, the court said:

"The reason for the rule is that any defect in such simple tools or appliances would be as obvious to the servant as to the master."

A number of ladder cases are cited by the Plaintiff in Error, but these all present the same circumstance, namely that the risk was obvious to the servant using it; and in many of the cases the servants had complained to their superiors prior to the happening of the accidents. Thus, in all the cases the defects were apparent, and in many of them it affirmatively appears that the defects were known.

Marsh vs. Chickering, 5 N. E. 56, is one of the leading cases on the subject under consideration. In that case the ladder was apt to slip; there were no hooks or spikes attached to it to prevent its slipping; the servant knew of this defect and complained of it several times, saying that there would be an accident. Here the defect was apparent and was known to the servant.

In *Jenney Electric L. & P. Co. vs. Murphy*, 18 N. E. 30, the syllabus is as follows:

"An employee of mature age and ordinary mental capacity, who is injured in his master's employ by reason of a defective ladder, one rail of which was broken off near the top, both master and servant knowing of the defect, and neither regarding

it as dangerous, cannot recover for such injury from his employer."

Stress is laid by the court on the knowledge by the servant of the defect; and the case really supports our contention that in the absence of such knowledge by the servant he would be entitled to recover.

In *Sheridan vs. Gorham Mfg. Co.*, 66 Atl., 576, 13 L. R. A. (N. S.) 687, the defect was that the spurs of the ladder were dull, so that they would not keep it from slipping. Held: the defect was obvious and the servant could not recover.

In a note in 13 L. R. A. (N. S.) the cases are collected. We call attention to those cited on pages 689, 690, under the heading: "Questions for the Jury."

In *McGill vs. Cleveland & S. W. Traction Co.*, 86 N. E. 589, the plaintiff alleged that prior to the accident he discovered the ladder to be "old, worn and defective to such an extent that the same was unfit for plaintiff to use" and specified particular defects, obvious in their nature. He alleged also having made complaint thereof ten days or two weeks prior to the accident, to his foreman and to the master mechanic. Relief was denied because the servant had full knowledge and therefore assumed the risk.

In *Borden vs. Daisy Roller Mill Co.*, 74 N. W. 91, there were no points at the bottom of the ladder to prevent slipping. It was held that the de-

fect was obvious and therefore the servant had no redress.

On page 93 of the report the court admits the rule that the employee is not required to search for defects.

Cahill vs. Hilton, 13 N. E. 339, is not really in point. From the evidence the court concluded that the accident was not caused by the breaking of the ladder, but that the ladder was broken by the accident. No defect in the ladder was shown, and the court was unable to see that there was a defect in the ladder which the master knew, and of which the servant, who had used it frequently, would be ignorant.

McGrath vs. Walsh, 4 N. Y. Supp. 705, was a ladder case. Two or three rungs were loose and would turn. The plaintiff had climbed it probably twenty times an hour for a day and a half. Held: Either the defect was patent and plaintiff must have observed it, or, for some occult reason which inspection would not disclose, the ladder suddenly became defective. In either case the master was not liable.

In *Henggler vs. Cohn*, 52 Atl. 280, the iron hinge of a step ladder broke. Held: there was no liability, because, if the defect was obvious, the servant would have observed it, and if it were not obvious inspection would not have disclosed it. In the first instance the servant would have assumed

the risk; in the second instance, the master would not have been negligent.

Hart vs. Village of Clinton, 100 N. Y. Supp. 1092, was a case where the servant was injured by the slipping of a ladder from a light mast against which it was leaning while in use. The ladder itself was sufficient, but it was claimed that it should have been supplied with hooks to hold it to the mast, or some other form of ladder should have been employed. The defects, if any, were perfectly obvious, and on general principles the risk was assumed.

Smith vs. Green Fuel Economizer Co., 108 N. Y. Supp. 45, was a case where the servant selected a warped ladder from a number of perfect ones. He put it too far away from the place he wanted to reach though he could have put it closer; he leaned over and tipped it, and it fell. The defect was obvious and the servant was negligent both in selecting it and in the manner of its use.

It will be observed, as we have heretofore stated, that in all these cases, the defects were perfectly apparent, and in many of them were actually known to the servants. Where it is claimed they were not known, the court has invoked the rule that the servant cannot plead ignorance of that which he must, in the nature of things, have known.

The only special rule which can be deduced from the "common tools cases" is this: That

whereas, in a case involving complicated machinery there may be knowledge of a defect without knowledge of the danger, and therefore there may be no assumption of risk. in the case of "common tools" knowledge of the defect ordinarily implies knowledge of the risk. This rule, however, is not absolute, as there may be known defects in common tools where the danger may not be known. For instance: if in this case Starr knew that the rung was cross-grained, he might not know it to be insufficient to bear his weight. If, however, he were to attempt to use it in its present broken condition, knowledge that the rung is broken would impute to him knowledge of the risk of his using that rung.

Having thus considered the authorities suggested by the Plaintiff in Error, let us now consider authorities tending to establish our contention.

Vol. 4 Thompson on Negligence, Sec. 3947, in part reads as follows:

"The master is under an affirmative duty to his servant to make a reasonable, diligent and skillful inspection and to resort to reasonable tests to see that any scaffold, ladder, etc., upon which he requires his servant to work, shall bear the weight to which he subjects it."

Secs. 3949 and 3950, of the same Volume, are as follows:

Sec. 3940: Whether the master undertakes to perform this duty himself, or through the agency

of another, he is liable for its negligent non-performance. For example, a company which undertakes to make and to furnish ladders for the use of its workmen, is bound to use reasonable care, to the end that the ladders shall be safe, and is responsible for the negligence of those whom it employs to construct them."

Sec. 3950. "This brings us to the next proposition, which is, that as this is one of those duties of the master which has been variously designated as a personal and unalienable, or unassignable duty, —though not in the sense of his being an insurer of its performance,—it is immaterial to whom or what grade of servant he delegates its performance; and, accordingly, a servant may recover damages of the master for his negligence in failing to perform this duty, although the negligence is that of a fellow servant to whom the master has committed the performance of the duty."

An analogous case is referred to in Sec. 3960 of the same Volume, as follows:

"Evidence that the defendant's foreman directed the plaintiff to go on the scaffold and go to work; that a plank on which the plaintiff and another were standing broke, precipitating them to the floor; and that the plank was cross-grained, and unfit for the purpose for which it was used,—is sufficient to require the submission of the case to the jury."

As to the duty of inspection we refer to Sec. 3786, of the same volume, which is, in part, as follows:

"The master is not only bound to make a reasonably careful inspection of the premises, machinery, tools and appliances which he provides

for the use of his servants, when they come into his hands, but he is also bound to repeat such inspections from time to time as often as may be reasonably necessary, having regard to the exigencies and risks of his business, to the end that they shall not be used by his servants after they get out of repair in such a sense as to be dangerous."

In Sec. 3791, it is said that this duty of the master is absolute and unalienable, and in the succeeding paragraph it is said that the master cannot absolve himself from this duty by a rule devolving it upon his servants generally.

Sec. 3951, of the same volume, in part, reads as follows:

"It is the duty of the master, and not the duty of the servant, to make the tests of such an appliance as above spoken of, and the servant is ordinarily entitled to rely upon the assumption that the master has done so; and the servant will not be liable on the ground of contributory negligence for failure to make such tests himself, or for using the scaffold, ladder, etc., unless the danger was so apparent that a person of ordinary prudence would not undertake the risk."

Sec. 3957, in part, reads as follows:

"It has been held that an employer who fails to furnish safe and suitable lumber for the construction of a staging by the employees for use in their work, and who, through his secretary, specially directs the use of a certain stringer in a specified place, is liable for an injury to an employee caused by the breaking of such stringer."

Sec. 4641. "On the other hand, the servant does not accept the risks of unknown, latent, unseen, or

obscure defects or dangers, such as the servant would not discover by the exercise of ordinary care and prudence, having reference to his situation, but such as the master ought to discover by exercising the duty of inspection which the law puts upon him to the end of seeing that the premises, tools and appliances with respect to which the servant is required to labor are in a reasonably safe condition, since the servant is not, in general,—except where he has agreed to do so by contract with his master,—required to institute special inspection for the purpose of discovering hidden dangers.”

In Vol. 1, Sec. 407, Page 1136, Labatt's Master and Servant, appears the following:

“As a matter of ultimate analysis, it will be found that the logical basis of the doctrine which thus places the master and the servant upon different footings in regard to imputed knowledge of risks is to be found in the fact that it is the special and appropriate function of the former to furnish and supervise the instrumentalities of his business, and the special and appropriate function of the servant to use those instrumentalities. The duty of making reasonably careful examination of the instrumentalities is a natural and necessary incident of the former function, but not of the latter.”

There are a number of cases where the tools were simple and where the defects could have been discovered by inspection, and yet it was held, either that the servant was entitled to recover or that it was for the jury to determine his right.

Thus in *Chicago & Pittsburg Milk Co. vs. Fehl*, 187 Fed. 792, the servant was supplied with defective lines. They had previously been broken

three times while used by him, and each time had been mended by another servant employed by the master for that purpose. The servant had driven a gentle team with these lines without accident. Afterwards he was supplied with new lines. They being needed for a parade in which the master was to be represented, the servant was again given the old lines to use in driving a somewhat different team. The team became frightened and started to run away and the lines broke occasioning the accident. It was argued that lines are a simple instrumentality, and that the servant was bound to know whether or not they were sufficient. It was held that the danger depended on many considerations, which the court named, and could not be said to be beyond question. Hence that the case was properly submitted to the jury.

In the case of *American Smelting & Refining Co. vs. McGee*, 157 Fed. 69, the servant operated a power punch. It was very simple. It had a die with a hole in it to receive the punch. There was a set screw with which the die was held in place so as to cause the punch to strike accurately in the hole in the die, but the set screw was broken. This defect could have been detected by the servant, who was an experienced workman, by examining the set screw, but it was not readily observable. Held: that the assumption of risk and contributory negligence were not conclusive, and these were questions for the jury.

The court distinguishes between the duty of the servant to know of an obvious defect and of one which was not obvious, and says: "The break of the set screw and the looseness of the die which made it dangerous were not apparent. They could have been discovered by the plaintiff only by searching out the screw in the side of the block and trying it. The duty to make this search was not cast upon the servant."

In the case of *Chicago, K. & W. Ry. Co., vs. Blevins*, 26 Pac. 687, an employee of a railway company, working on a bridge, was thrown off his balance and injured by a fall. He asserted that the accident was caused by the rebound of a maul furnished him by the company for his use, the tool having a cracked and crooked handle and with a surface so battered and worn as to be dangerous, and that the rebound which caused the fall was due to the defective character of the maul. He claimed that the defect was not apparent to him because his work was being done in great haste. Held: a question for the jury, and a verdict for the plaintiff was upheld.

In *Williams vs. Garbutt Lumber Co.*, 64 S. E. 65, is a very able and valuable discussion of the questions at bar by Lumpkin, Judge; the entire case should be read, as it is the best discussion of the subject which we have seen. We will, however, quote from it somewhat at length as follows:

"The general rule requires a master to use ordinary diligence to furnish his servant with appliances reasonably suited for the use for which they are intended, and to use like diligence in inspecting and keeping them in proper condition for use. To this general rule some courts of other states have declared that there exists what has been denominated an exception as to "simple tools." The basis on which this has been placed by some of the courts is that where a tool or instrumentality is so entirely simple in its nature and character that its condition can be seen at a glance, or that one who uses it has as good an opportunity as the master for knowing its condition, the servant cannot recover on the ground that the master did not inspect it. In some of the decisions there is a broad announcement that the master is under no duty to inspect such simple tools. It will be found, however, that in most of the cases where this rule or exception was applied the controversy was between the master and the servant to whom he furnished the tool, and where the defect and danger were so apparent that the servant was guilty of negligence in using the tool, or where he knew of its condition, or had equal opportunity with the master for knowing it. The apparent hardship of holding the master to a high degree of diligence relatively to his servant in regard to inspecting very simple things, the condition of which must be patent to the person using them, appears also to have had weight in some instances."

On page 68 it is said:

"While these rules result practically in a relaxation of the master's duty and liability in the case of such simple tools, they are not at all in denial of the general underlying principle of the law of negligence that one who knowingly exposes another to a likelihood of injury is liable therefor, in the absence of consent by such other or of contributory negligence."

We quote further from page 68:

“The mere simplicity of a tool, as is apparent upon consideration of the basis above stated of the rule or respondent superior, will not exempt the master from all care, or relieve him from liability under all circumstances; but the capacity, intelligence, and experience of the servant, the character of the defects, his opportunity for detecting them, his situation and the circumstances calculated to withdraw his attention from them, as well as the fact that the servant has a right to rely upon the master to protect him from danger and injury, and in selecting the agent from which it may arise, are factors of varying importance, which must also be taken into account.”

On pages 69 and 70 it is said:

“While in a number of cases, in dealing with the particular facts involved, it has been held that the tool then being used (such as a stick with which to push cars, an ordinary hammer, or the like) was so simple in its character that the servant had at least equal opportunity with the master for observing it, and that he was at fault for not doing so, or that the master could not be charged with negligence as a matter of law for not inspecting it, and that, therefore, in such cases there could be no recovery, no arbitrary and invariable rule can be laid down by which it can be declared that a master is relieved from the duty of inspecting certain specified tools, regardless of the circumstances of the case. Nor can a court well undertake to make a catalogue of tools by name, and say that as to injuries caused by them there shall be an arbitrary exemption from liability on the part of the master. At last the duty of the master must necessarily to some extent depend, not merely upon the name of the tool, but also the circumstances under which it is furnished or kept for use and

under which it is used. The underlying principle, rather than the name of the tool, is the important matter."

In *Jones vs. Pacific Mills*, 57 N. E. 663, one side of a ladder was spliced, and in use broke. The evidence was conflicting as to the effect of the splice upon the strength of the ladder, some witnesses contending that the side was not more than fifty per cent as strong as it would have been if it had never been broken, while others testified that it was as strong as ever. It was held: that the peril was not obvious to plaintiff and therefore it could not be said that he was negligent as a matter of law in using it. The same considerations would apply to a defense of assumption of risk. In the discussion the court said:

"We think, that, upon the evidence, the questions whether the accident was attributable to the use of the ladder as it was intended to be used, whether the plaintiff knew and appreciated the risk arising from the manner in which this ladder had been spliced, were questions of fact for the jury."

In *Flanigan vs. Guggenheim Smelting Co.*, 44 Atl. 762, the servant was injured by the giving way of a ladder made in the company's carpenter shop and furnished the servant for use. There was evidence that a cross-piece broke near its left end where a nail was driven through it in the side piece near a knot in the cross-piece. It was held: that the sufficiency of the ladder, whether there was a structural defect in it which was ascertainable

by inspection, whether it was negligence for the servant to use it, whether he was negligent in stepping upon that particular rung, whether the breaking of the ladder was one of the ordinary risks of his employment, or, *was an obvious risk*, and the like, were all questions of fact and as such were for the jury.

It being claimed that the negligent construction, if any, was that of the carpenter who was claimed to be a fellow servant, the court lays down the rule that the carpenter in furnishing the appliance for the use of the plaintiff was doing the duty of the master and represented him therein.

In the case of *Flood vs. Western Union Telegraph Company*, 15 N. Y. Supp. 400, the servant had occasion to do some work upon the outer end of an arm of a telegraph pole between which and the pole a hole had been bored in the arm to admit a certain peg to hold a glass insulator. The arm broke where the hole was bored and there was evidence that it was cross-grained and brittle—"dozy." The servant rested some weight on the arm beyond where the hole was bored. It was argued that the servant was in as good position as the master to know the condition of the arm. It was held: that the servant was not there to inspect, but to work, and that he was not bound to make inspection; and that it was a question for the jury whether or not the danger was obvious.

In *Standard Oil Company vs. Bowker*, 40 N. E.

128, the servant was injured through the giving way of a rung of a ladder. There was evidence that the nails were too small and were driven with the grain of the wood. It was held that as the Company made the ladder it had notice of its defective condition. The case is important as showing that recovery may be had for an accident happening through the insufficiency of the ladder where the danger is not necessarily obvious to the servant.

In *Ritt vs. True Teg Paint Company*, 69 S. W. 324, the servant complained to his superintendent about the condition of several ladders including the one which broke. The Superintendent said the ladders were all right. A few days later the servant used this particular ladder and it broke, injuring him. The ladder had in the meantime been repaired by a fellow servant and looked all right. It was held that the servant was entitled to damage and that he was not guilty of contributory negligence. The value of this case lies in the fact that it in effect holds that the servant may rely upon the appearance of the ladder, and if it is not obviously defective he may use it without being guilty of contributory negligence.

From *Trombly vs. Consolidated Electric Light Company*, 64 L. R. A. 551, we quote.

"The plaintiff was employed upon a ladder about 25 feet from the ground, and, in reaching for a rope with one hand, nearly his whole weight was suspended from a round in the ladder which

he held with the other hand. The round broke, and he fell to the ground, sustaining injuries. * * *

“The ladder in question was a 40-foot extension ladder and was extended at the time of the accident to the plaintiff. There was evidence that an examination of the round after the accident showed it to be “dozy” on the outside, and rotten. The ladder had been in use somewhat more than three years. It seems that the defendant company had no regular rules governing the inspection of appliances. * * * And we think it was fairly open to the jury to find that the defective condition of the round might have been discovered had it been suitably inspected; not, perhaps, by such an inspection as would naturally be given to it by the workman upon it, whose duty it was to work, not to inspect, and who might lawfully rely upon the presumption that the master had performed its duty, but by such an inspection on the part of the master as reasonably would be necessary to make sure that an appliance upon which the servant was to risk his life or limb every time he used it was reasonably safe.

The plaintiff testified that the round looked all right as he worked upon the ladder. But even that fact does not show that it was all right, or that the unsafe condition might not have been discovered by suitable inspection, such as was incumbent upon the master, unless in some way relieved from the duty.

But it is contended, as a matter of law, that the defendant is not liable upon the evidence. It is urged that there is no duty resting on the master to inspect, during their use, those common tools and appliances with which everyone is conversant; that, if they wear out and become defective, the employer may rely upon the presumption that those using them will first detect the defect;

and that the employer is not to be held for negligence when the tool is a common one, of the fitness of which the servant is as competent to judge as the master. And the defendant cites authorities in support of these propositions. But it seems to us that a 40-foot extension ladder is not a common tool or appliance within the meaning of these rules. A defect in a ladder, arising from age or decay, might not be discoverable by such inspection as a workman is expected to make, and might be upon more careful inspection. To replace a "dozy" round of a ladder is not, we think such "ordinary repairs" as a workman using it is usually expected to make, and certainly not unless the defect is brought to the knowledge of the servant. Of course, a master may furnish suitable materials for such renovations, and the circumstances in a given case may show that the workman is expected to make his own repairs. And in such case the master is not responsible for the neglect of the workman. But that is not this case. This plaintiff was under no special duty to inspect or repair this ladder, except as rainy-day work in common with his fellow laborers, when he might be directed specially to do so."

From the foregoing authorities the following rules may be deduced: That the master is bound to inspect and the servant is not. That the servant assumes an obvious risk but not one which is not apparent without inspection. That if the risk can be discovered by reasonable inspection, and cannot be seen without such inspection, then the risk is that of the master, whose duty it is to inspect, and is not assumed by the servant.

Applying the facts in this case to the rules thus announced Starr is entitled to recover. All of the

witnesses, including the foreman, agree, that the fact that this rung was cross-grained was not observed by them, and would not be observed by ordinary use of the instrumentality. They likewise agree that it would be apparent upon close inspection. That such defect would not suggest itself to the servant, and put him upon his guard, follows from the fact, testified to by nearly every witness, that a cross-grained rung is very rare. They testified likewise that the use of such a rung is dangerous, and Starr says that if he had known that the rung was cross-grained he would not have used it. Every element, therefore, necessary to uphold the recovery in this case, appears from the uncontradicted evidence in the record.

III.

The third proposition laid down in the brief of the Plaintiff in Error is worded as follows:

“The plaintiff below assumed the risk of the frailty of the ladder and was guilty of contributory negligence in using it as he did.”

This point is based upon the appearance of the ladder itself. The witnesses, with the exception of Starr and the Doctors, were summoned into court by the company, and most of them were in the company's employ. They were experienced men in the use of ladders. None of them, except Filer, detected any frailty in the ladder. He did not communicate his fears of it to any of his coservants. The foreman, who is a most intelligent man, and

was still in the employ of the Plaintiff in Error, undoubtedly regarded the ladder as sufficient, or he would not have directed its use. Starr testified that the ladder looked all right. McMellon, testified that at the time of the accident he was waiting to use the same ladder. All seem to regard the ladder as being sufficient and it would have been sufficient if the rung which broke had not been cross-grained. The other rungs of the Filer ladder are of the same size as the rung which broke. They are fastened on to the sides in the same manner; none of them gave way, and it is fair to presume that the rung which broke would not have given way if it had not been cross-grained. To be sure it does not appear how much use was given the other rungs of the ladder, just as it does not appear that Starr got upon the cross-grained rung a single time before the time when he was injured. It was apparent, however, that the other rungs must have been used by Starr or he could not have reached the one which broke.

Against the evidence of these experienced men, against the findings of the jury and of the lower court, against the evident fact that the rungs which were not cross-grained were sufficient to bear and did bear Starr's weight, though they are as small and as frail in other respects as the one which broke, we are asked to say, on the authority of a lawyer's observation and opinion, and the court is asked to conclude on its own observation, that the rung which broke would have broken even if its

grain had been straight. It is not safe for us to formulate opinions after the event. When a rung has broken it is easy to say that it was small and weak, for the very happening of the accident tends to create that impression on the mind. We consider it unsafe, however, to attempt to balance our unskilled opinions, or that of any other professional man, against the actions, opinions, and testimony of men skilled in the use of such instrumentalities. The test of reasonable care on the part of a servant for his own safety, is that of the care of a man of ordinary prudence in like circumstances. Here, the action of Starr in using the ladder conformed to that of his fellow servants and that of his foreman. When it is shown that the foreman ordered the use of the instrumentality, and that Starr and his fellow servants undertook to use it without question, it is proven that men of ordinary prudence—for such they are presumed to be—would use the instrumentality, and, as we have said, that use was justified by the security of the other rungs which were not cross-grained when subjected to the same strain.

Under this head, attention is again called by Plaintiff in Error to the fact that there were five short pieces of ladder at this place. We have already shown in our statement of the case, that two of these pieces so referred to were component parts of the company's extension ladder, one a very small affair which Filer was using, and there were but two pieces available to be spliced to make

up the longer ladder, and these were the two which Smith directed to be used and which were used for that purpose.

IV.

The fourth proposition presented by Plaintiff in Error is thus stated in its brief:

“The plaintiff below failed completely to prove his cause of action.”

It is claimed that we failed to prove our allegation, “that certain ladders had been furnished for said gang of men by the defendant for their use, and plaintiff had nothing to do with the furnishing of said ladders.”

It is stated that the proof showed the contrary, and that plaintiff and his fellow servants furnished their own ladders, and that plaintiff actually builded the very ladder upon which he was injured.

We have so frequently, in this brief, adverted to the facts on this point, that it is necessary for us to say no more than this, that we take issue absolutely with counsel upon that statement. We contend that the record shows, beyond question, that the defendant undertook to furnish ladders, and that when the men, because of the failure of the company to perform its full duty, procured two short ladders for other work, the defendant, through its foreman, who had charge of the furnishing of ladders to the men, adopted these pieces of ladder as the material for the construction of

the ladder which broke, and directed that a ladder be constructed by the splicing of these two ladders together. Plaintiff did not build the ladder. He simply assisted in making the splice; and that part of the work was well done. Neither the plaintiff nor his fellow servants would have used a spliced ladder, as is shown by their request to the foreman to procure them a long ladder, if it had not been for the express command of their foreman.

It is said, also, by way of argument, that this point goes to the very essence of the case. On the contrary, if it cannot be said in law that this particular ladder, under the circumstances, was furnished by the defendant, yet its use was directed by the defendant, and the legal consequences are the same. Now there is not even a variance between an allegation that the defendant furnished the ladder, and that the defendant directed the use of a ladder owned or furnished by some one else, for the essential element in each case is, that this is the provision made by the master in the performance of his duty to furnish instrumentalities for the work. As we say, it would not even be a variance, far less a failure of proof.

Let us assume, however, that the two circumstances are essentially and legally different. Then the question arises what effect it will have upon our right of recovery.

It is not necessary for us to cite authority upon the proposition that in actions of law the Federal

courts of a state conform to the practice of the state courts in all matters of procedure. The question presented under this subdivision therefore is determinable by the decisions of the supreme court of the State of Washington.

But one authority from this state is cited in the brief, namely: the case of *Albin vs. Seattle Electric Company*, 40 Wash. 51. The court will observe, on reading that case, that there was no relation between the allegations and the proof. The negligence alleged did not belong to the same class as the negligence proven; and finally, and most important, the evidence was introduced over the objection of the defendant.

In this case the evidence of the manner in which the ladder was furnished, and the circumstances under which it was used, was introduced without objection. In point of fact we think there were but two objections made during the course of the trial, one of which was made by the company and appears on page 27 of the record, and was sustained, and one of which was made by the plaintiff and overruled by the court, and which appears on page 94 of the record, neither of which has any bearing upon the case. All the facts upon which plaintiff recovered judgment were admitted without objection of any kind.

In such case, it is held in *Sherman vs. Sweeney*, 29 Wash. 321, 331, that evidence so introduced without objection becomes the property of the case,

and that the court and jury must give effect to it as if it were pleaded, the pleading being considered amended for that purpose.

Also in *Carlisle Packing Company vs. Deming*, 62 Wash. 455, where a certain essential fact had not been pleaded, but proof of it was admitted without objection, the court, upon motion for a non-suit, treated the pleading as being amended to conform to the proof.

CONCLUSION.

The evidence in this case was given almost wholly by witnesses summoned by the company but introduced by Starr. The witnesses, for the most part, are employces of the company, and certainly were not partisans of the other side. Their evidence was so frank and fair that they were cross-examined very briefly. Their stories are absolutely consistent, not only with each other but with the physical evidence introduced. The Defendant in Error was badly injured, as is evidenced by the fact that it is not complained that this large verdict is in any respect excessive. No complaint is made of the instructions of the court. The case, therefore, having been submitted fairly to the jury upon truthful testimony, we submit that the verdict of the jury ought not to be disturbed.

Respectfully submitted,

C. A. REYNOLDS,
HARRY BALLINGER,
CHARLES T. HUTSON,

Attorneys for Defendant in Error.

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE PACIFIC TELEPHONE AND TELEGRAPH
COMPANY (a corporation),

Plaintiff in Error,

VS.

FRANK STARR,

Defendant in Error.

No. 2242

Upon Writ of Error to the United States District Court for the
Western District of Washington, Northern Division.

REPLY BRIEF OF PLAINTIFF IN ERROR.

The defendant in error has presented for the consideration of the court some propositions which may not have been sufficiently anticipated in our initial brief. We therefore deem it proper to present the following in answer thereto: It may be fairly said that counsel has not neglected to present his case with ingenuity and some plausibility. It will be observed that he makes his case depend upon the single thread that Smith (called the foreman) directed the plaintiff below to use a piece of ladder which proved to be defective, and that the master for whom Smith was working is therefore liable.

The vice of the argument is to be found in this: Conceding it to be a fact that Smith specifically directed the ladder to be made of these particular two pieces, out of the five or six which were upon the ground (a fact which is by no means made clear by the evidence), he was not, in so doing, acting for the master, because he was not performing a function which the master had undertaken to perform. He was, therefore, not a vice-principal, but a fellow servant for whose act the master is not liable.

It is the accepted rule, in the Federal courts at least, that the question of vice-principal, or fellow servant, is determined by the function performed and not by the name by which an employee is designated, or the extent of his authority or control. As is said in *B. & O. Railroad Co. v. Baugh*, 149 U. S. 368, 387:

“Therefore it will be seen that the question turns rather on the character of the act than on the relation of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor.”

See, also, exhaustive list of cases cited in *American Bridge Co. v. Seeds*, 144 Fed. 605.

If the defendant company had undertaken to furnish ladders this would have been a function that could not have been delegated and had the company commissioned Smith or any other employee to perform it, that em-

ployee, regardless of the name by which he was called, would have been a vice-principal.

The undisputed testimony in this case, however, was that the contract of employment (a contract made of a custom to which Starr himself had assented for four years) contemplated that not the company, but the employees themselves, should furnish their own ladders when sufficient of the company's ladders were not at hand. This was an instance where sufficient of the company's ladders were not at hand and the ladders in question were those furnished by the employees, as Starr himself well knew. He testifies:

"Q. If there were six men working, how many ladders would they need if their work was twenty feet above the surface of the ground?

A. They would need at least three.

Q. How many ladders did the company furnish directly at that time and place?

A. One.

Q. You have heard the testimony concerning the use of two ladders, one of which may be designated as the Filer ladder and the other as the McCartney ladder?

A. Yes, sir.

Q. Do you remember those ladders were on the job?

A. Yes, sir" (record, page 84).

And again on cross-examination he says:

"Q. In other words, the company did not furnish either one of those pieces.

A. No.

Q. Filer and McCartney, who were working in the same capacity you were, were they——

A. Yes, sir.

Q. Either of them got them somewhere?

A. Yes, sir.

Q. The day before. And the lower portion was probably gotten two days before?

A. Yes, sir.

Q. The upper portion the day before, the same day you spliced together, the upper portion?

A. I don't remember exactly whether it was got the day before or not but it was got a day or two, something like that" (record, page 95).

Indeed it is not disputed that all the six men upon the work, including Starr, knew perfectly that the ladders in question were those which had been secured under the rule that the employees should "rustle" their own ladders.

It should not, we take it, be doubted that in the absence of statutory prohibition, the master and servant may contract that the servant furnish or inspect his own appliances, in which event the servant assumes the risk of any defect in an appliance thus selected or undertaken to be selected by himself or his co-workers. The rule is stated in *26 Cyc.*, 1329:

"Where a servant is authorized or required by the employment to himself furnish his own appliances for the work, the master is not liable where a fellow servant is injured because of defects therein."

It was said by Judge Lurton in *Brittain v. Central Union Telephone Company*, 131 Federal 844, at page 845, in a case where damages were claimed because of a defective telephone pole:

"The practice and custom under which it conducted its operations made every lineman his own inspector and linemen were required to make such inspection and testing of poles before going on

them as they should deem essential to their own safety, in doing the work they assumed to do * * * but we see no reason why a lineman in view of the peculiar character of his work, may not lawfully contract to do any inspecting or testing reasonably necessary to determine whether he can safely climb a particular pole for the purpose of adjusting, transposing, or placing new wires. His acceptance of service with knowledge of the way in which the company conducts this part of its business, whether that way be the safest for him or not, would imply an assumption of the risks incident to that mode of carrying on its work."

It therefore follows, that even if we go so far as to concede that Smith selected the ladder which Starr was using, he was in that regard performing no function of the master because the master had not undertaken to perform such function.

The most that can be claimed is that Smith was negligent in directing Starr to splice and go up on a ladder without inspecting it so as to ascertain its strength. If Smith was negligent in this respect, it would still be the negligence of a fellow servant and the master is not liable any more than it would be for any other act or omission of Smith in the direction of details of the work.

**WHAT INSPECTION OR TEST WOULD SMITH BE REQUIRED
TO MAKE.**

No rule is better settled than that the master is not an insurer of the safety of the servant. He has discharged his duty to a servant when he has made and continued, as prudence requires, a *reasonable* inspection

or test. Unquestionably the rule is as stated by Thompson (4 *Thompson on Negligence*, section 3947):

“The master is under an affirmative duty to his servant to make a reasonable, diligent and skillful inspection and to resort to reasonable tests to see that any scaffolds, ladders etc., on which he requires his servant to work shall bear the weight to which he subjects it.”

Or as stated by the Supreme Court in *B. & O. Railroad v. Baugh*, 149 U. S. at page 386:

“That positive duty (the duty to provide the place, tools and machinery) does not go the extent of a guarantee of safety but it does require that reasonable precautions be taken to secure safety.”

Now what is *reasonable* inspection or what the nature or extent of the test required is manifestly to be measured by the character of the appliance or the use to which it is to be subjected. If the master places in his servant's hands an appliance complicated in its structure, or one about which latent or concealed defects may exist, a particular, intimate scrutiny and test is required; but in the case of a simple appliance where every part is apparent and where any deficiency is ordinarily readily observable to the glance or the touch, we submit a more superficial examination is all that reasonableness requires. Surely in the case of a ladder, the duty to make a “reasonable inspection” would not require that Smith do more than scrutinize the materials out of which it was made; to observe if they were of sufficient size and as far as the eye could tell, of sufficient apparent strength; to observe if it

had become warped, or if the nails which held its parts together had become loosened. Surely he would not be required to make a minute examination of the grain of the wood, or to submit each particular component part to a weight test in order to determine its exact tensile strength. If this be true Smith, even if he had been representing the master, in the exercise of reasonable precaution, could not have been required to make a closer or more intimate observation or test than the very one which Starr himself must necessarily have made when he had the ladder before him and was handling it while he and McCartney spliced it.

It follows, therefore, that even had the duty of reasonable inspection rested upon Smith, and even if he could be said to have been the representative of the master in the performance of a function which it was the master's duty to perform, and he were guilty of negligence in not discovering the defect, Starr was equally guilty in not discovering it for himself.

An analysis of all the cases cited by the defendant in error will demonstrate that they differ in principle from the case at bar in at least three essentials, namely: First, they are cases where the master has assumed the duty of furnishing the appliances; Second, the servant had no such opportunity of inspection as was afforded Starr in the present case; Third, the defect complained of was much more obscure than in the present case.

Counsel's diligence has enabled him to find and cite the two or three cases where state courts have refused to class ladder cases under the "common tools" doc-

trine, but we confidently assert that if the court is disposed to be controlled by the great weight of authority it cannot adopt the doctrine for which counsel contends, as an examination of the authorities cited upon pages 15 et seq. of our initial brief will demonstrate.

It cannot escape the observation of the court that counsel for the defendant in error has audaciously attempted to leap the insurmountable barrier which consists of the fact that the appliance which caused the injury was not furnished by the master nor by any one delegated by the master to perform such function. If the fact is borne in mind that the appliance was selected by the defendant in error and his fellow servants under a rule or custom in which both parties to this action had assented, the conclusion cannot be escaped that any negligence which caused the accident was that of Starr and his co-employees and for which the master is not liable.

Respectfully submitted,

PILLSBURY, MADISON & SUTRO,

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

DUVAL JACKSON,

Petitioner,

vs.

SAMUEL L. BOYD, as Trustee in Bankruptcy of THE
LANE LUMBER COMPANY, LIMITED, a Cor-
poration, Bankrupt,

Respondent.

In the Matter of THE LANE LUMBER COMPANY,
LIMITED, a Corporation, Involuntary Bankrupt.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, the Decree of the United States District
Court for the District of Idaho,
Northern Division.

FILED
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F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

DUVAL JACKSON,

Petitioner,

vs.

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LANE LUMBER COMPANY, LIMITED, a Corporation, Bankrupt,

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*The United States Circuit Court of Appeals for the
Ninth Circuit.*

THE LANE LUMBER COMPANY, LTD.,

A Bankrupt.

In the Matter of DUVAL JACKSON,

Petitioner.

**Petition [to U. S. Circuit Court of Appeals] for
Review.**

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

The petition of Duval Jackson respectfully shows unto the Court:

First: That on the 7th day of October, 1912, your petitioner filed with the referee his petition, a certified copy of which is hereto attached and made a part hereof, and covers pages — to —, inclusive.

Second: That on the 22d day of October, 1912, the trustee of the said Lane Lumber Company, Ltd., filed with the referee his answer to said petition, a certified copy of which is hereto attached and made a part hereof, and covers pages — to —, inclusive.

Third: That on the 11th day of November, 1912, said petition and answer came on for hearing before the referee on briefs of the respective parties thereto, and at the said time the Court made an order therein granting your petitioner the relief prayed for in said petition, a certified copy of which order is hereto attached and made a part hereof, and covers pages — to —, inclusive.

Fourth: That thereafter and on the 20th day of November, 1912, the trustee in said matter filed his petition for review [1*] and the same was by the said referee duly certified by the Honorable F. S. Dietrich, District Judge of said district.

Fifth: That on the 29th day of November, 1912, said petition and answer came on for hearing before the Honorable F. S. Dietrich, District Judge of said district, at the regular November term of court, held at Coeur d'Alene, County of Kootenai, State of Idaho, in said district, and after argument of counsel for the respective parties, the Court took the matter under advisement, and on the 3d day of December, 1912, reversed the decision of the referee, and on the 6th day of December, 1912, *enter* findings of fact and conclusion of law, a certified copy of which is hereto attached and made a part hereof and covers pages — to —, inclusive.

Sixth: That on the said third day of December, 1912, said District Judge made and filed his memorandum decision in said matter, a certified copy of which is hereto attached and made a part hereof, and covers pages — to —, inclusive.

Seventh: That on said third day of December, 1912, said District Judge rendered his decree in said matter, and on the sixth day of December, 1912, filed the same with the clerk of said court, a certified copy of which is hereto attached and made a part hereof, and covers pages — to —, inclusive.

Eighth: Your petitioner charges the fact to be that the said District Court erred in making and fil-

*Page-number appearing at foot of page of original certified Record.

ing his decree in said matter, and in denying petitioner the relief asked in said petition, and your petitioner is aggrieved thereby, and therefore prays this Honorable Court to review and revise the decision of said Court below.

Ninth: Your petitioner therefore prays that such decree of the district court be set aside and held for naught, and that by the order of this Court it be decreed that the trustee of said Lane Lumber Company, Ltd., refund to your petitioner [2] the \$2,000.00 prayed for in his petition, and that your petitioner be given such other and further relief as shall be proper.

DUVAL JACKSON,

Petitioner.

By FRANK W. REED,

EUGENE V. BOUGHTON,

Attorneys for Petitioner, Coeur d'Alene, Idaho.

CLAY H. ALEXANDER,

Attorney for Petitioner, Kansas City, Mo.

State of Idaho,

County of Kootenai,

In Said District,—ss.

F. W. Reed, being first duly sworn, deposes and says that he is a member of the firm of Reed & Boughton, attorneys for petitioner, in the foregoing matter, and makes this affidavit for and on behalf of said petitioner, he being acquainted with the facts, and does hereby make solemn oath that the statements contained in the foregoing petition are true ac-

according to the best of his knowledge, information and belief.

F. W. REED.

Subscribed and sworn to before me this 21st day of January, A. D. 1913.

[Seal]

N. D. WERNETTE,

Notary Public. [3]

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

**Petition [to U. S. District Court for Order Requir-
ing Trustee to Make Repayment of \$2,000.00].**

Now comes Duval Jackson, by his attorneys, Reed
& Boughton, and represents to this Honorable Court:

I.

That on the 24th day of June, 1912, he made a proposal to purchase certain property of the above-named bankrupt, which proposal was in writing, a copy of which is hereto attached and made a part hereof and marked Exhibit "A"; that on said 24th day of June, 1912, your petitioner made a proposal to purchase certain other property of the above-named bankrupt, which proposal was in writing and a copy of which is hereto attached, and made a part hereof, and marked Exhibit "B."

II.

That in pursuance of such proposals, and according to the terms thereof, your petitioner deposited

with the Trustee in Bankruptcy in said matter the sum of One Thousand (\$1,000.00) Dollars on each of said proposals, as evidence of the good faith of petitioner, which sums were to be returned to your petitioner in case the trustee failed to secure the acceptance and confirmation of each of said proposals.

III.

That thereafter and on the 27th day of June, 1912, the trustee in bankruptcy in said matter made and filed a petition for confirmation of sale of the real and personal property of said bankrupt, to your petitioner, and that a copy of the said petition for confirmation of sale is hereto attached, made a part hereof, and marked Exhibit "C." On the 29th day of June [4] 1912, a notice of hearing on the order to show cause was issued by the Court in said matter, setting Monday, the 15th day of July, 1912, at 11 o'clock A. M., as the time for hearing said order, a copy of which said notice is hereto attached, made a part hereof, and marked Exhibit "D."

IV.

That thereafter and on the 10th day of July, 1912, your petitioner sent a telegram to the trustee of the above-entitled estate, withdrawing the propositions for purchase of the property of said bankrupt, and that a copy of said telegram is hereto attached, made a part hereof, and marked Exhibit "E"; that on the same day your petitioner also sent a telegram to the referee in bankruptcy in said matter, and that a copy of said telegram is hereto attached, made a part hereof, and marked Exhibit "F."

V.

That on the said 10th day of July, 1912, your petitioner mailed two written withdrawals of the proposals to purchase the property of said bankrupt, a copy of which written notices *are* hereto attached, made a part hereof, and marked Exhibit "H" and Exhibit "I"; that said written withdrawals were received by the Referee on the 15th day of July, 1912, at 8:45 o'clock A. M.; that on the 15th day of July, 1912, notwithstanding the notice of withdrawal of said proposals to purchase the property of said bankrupt, an order was made by the Court in said cause, confirming the sale of the property mentioned in said proposals of purchase, except certain lumber and logs mentioned in said order; that a copy of said order of confirmation is hereto attached, made a part hereof, and marked Exhibit "J." [5]

VI.

That thereafter, and on July 26th, 1912, said Court confirmed a sale of about 300,000 feet of cedar logs of said bankrupt, and all of the lumber of said bankrupt described on pages one to eighteen, inclusive, of the Appraisers' report filed in said court, said lumber and logs being the same as excepted from the order of confirmation of sale to your petitioner; that a copy of the order confirming the sale of said logs and lumber is hereto attached, made a part hereof, and marked Exhibit "J."

WHEREFORE, your petitioner prays that an order may be made requiring the trustee in said matter to pay to your petitioner, or his attorneys, Reed & Boughton, the sum of Two Thousand (\$2,000.00)

Dollars, the same being a repayment of the Two Thousand Dollars deposited with said trustee on the 24th day of June, 1912, according to two proposals for purchase of certain property of said bankrupt.

Dated this fourth day of October, A. D. 1912.

DUVAL JACKSON,

Petitioner.

By REED & BOUGHTON,

His Attorneys. [6]

State of Idaho,

County of Kootenai,—ss.

F. W. Reed, being duly sworn, deposes and says that he is a member of the firm of Reed & Boughton, attorneys for the above petitioner, and makes this verification for the reason that said Duval Jackson is not within the State of Idaho; that he has read said petition, knows the contents thereof, and that the same is true.

F. W. REED.

Subscribed and sworn to before me this 15th day of October, 1912.

LAWRENCE L. LEWIS,

Referee. [7]

Exhibit "A."

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

No. 449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

Proposal to Purchase Certain Property.

Before LAWRENCE L. LEWIS, Referee in
Bankruptcy.

To Samuel L. Boyd, Trustee in Bankruptcy of Lane
Lumber Company, Limited:

The undersigned proposes to purchase of you, subject to the confirmation and approval of the above-entitled court, all of the property and assets of the Lane Lumber Company of whatsoever kind, character, or description, excepting only its timber lands and including all the property, save only said timber lands scheduled in the schedule and inventory annexed to your petition to sell real and personal property filed in the above-entitled court on the —— day of February, 1912, which said petition, with schedule and inventory attached, is now on file in said court and reference to which is hereby made; excepting only from said schedule and inventory the timber lands above referred to and certain assets which have been sold, or otherwise disposed of by you, report of which are likewise now on file in the above-entitled cause.

This proposal includes all of the lumber of said company scheduled in said schedule as 3,186,631 feet in quantity, all of the moldings scheduled in said schedule and inventory as amounting to 58,524 lineal feet in quantity, all of the lath in said schedule scheduled as amounting to 334,600 pieces, all of the logs of the company scheduled in said schedule as amounting to 17,715 mixed logs in quantity; all of the stable supplies, wagons, boat-houses, boat docks, rowboats,

livestock, office furniture and fixtures, tools, mill supplies, realty and equipment, cooking utensils, furniture, *tools*, tugboat, barge, boom-stick and boom-chains.

Also including the following real estate and property situated in Kootenai County, Idaho:

All lands in lots numbered five (5) and six (6) of Section thirty-one (31) of Township Forty-eight (48) North, Range Three (3) W., B. M., lying between the Oregon Railroad & Navigation Company track and the Coeur d'Alene River, and all land in lot numbered six (6) of section thirty-one (31), township forty-eight (48) north, range three (3) W., B. M., lying south of the Oregon Railroad & Navigation Co. Railroad track that is below the elevation of twenty-one hundred and twenty-eight (2,128) feet above mean sea level.

The mill is situated on lot five (5) and the Lumber Yard on lot six (6).

Commencing at the northeast corner of section one (1), township forty-seven (47) north, range four (4) W., B. M., running thence west along the township line one thousand (1,000) feet to a point on said township line; thence north at right angles to said township line to the south bank of the Coeur d'Alene [8] River; thence in the northeasterly direction along the said south bank of the Coeur d'Alene River to a point where the same intersects the range line dividing ranges three (3) and four (4), township forty-eight (48); thence south to a place of beginning, all of said land being situated in lot two (2), section thirty-six (36), township (48) north, range

four (4) W., B. M.; also all of land in lots seven (7), eight (8), and nine (9), in section thirty-one (31), township forty-eight (48) north, range three (3) W., B. M., that is below the elevation of twenty-one hundred and twenty-eight (2,128) feet above the mean level of the sea.

The blacksmith-shop, storehouse and barn are situated on the land above described in lot two.

Along the Coeur d'Alene River in front of lot two (2), section thirty-six (36), township 48 N., range 4 W., B. M., and lots 5, 6, 7 and 8, section thirty-six (36), township 48 north, range four (4) W., B. M., are piling and booms which have been and now are used by the Lane Lumber Company, Ltd., Bankrupt, for receiving and storing logs.

E. $\frac{1}{2}$ lot 1, section 1, Twp. 47 N., R. 3 W., B. M., north of O. R. & N. Railroad, portion of lot 4, sec. 6, Twp. 47 N., R. 4 W., B. M., north of O. R. & N. Railroad; in both tracts about 17 acres, with office building thereon.

There is a dispute relative to the title of the above land, A. A. Crane of Harrison, Idaho, claiming it, and the officers of the bankrupt claiming that he agreed to convey and did convey said land to the bankrupt, but that the deed conveying it was insufficient and they returned it to him for correction and he neglected to correct and return the deed to the officers of the bankrupt. Record and Company's vouchers show payment of \$680 for the above land, purchased in fall of 1908.

Lot eight (8), section fourteen (14), township forty-eight (48) north, range two (2) W., B. M., con-

taining two and one-half ($2\frac{1}{2}$) acres, more or less.

On the above-described land there are situated two houses and one shed, one house is rented at \$5.00, per month, another vacant.

Commencing at the point on the north side of the O. R. & N. right-of-way, at a point where said O. R. & N. right-of-way crosses the west line of the northwest quarter of section thirteen (13), township forty-eight (48) north, range two (2) W., B. M., thence easterly and along said right-of-way of O. R. & N., to "Old Water Tank Ditch," thence to a northeasterly direction along the "Water Tank Ditch" to the Coeur d'Alene River; thence southwesterly along said river to the west line of the northwest quarter of section thirteen (13), township 48 north, range two (2) W., B. M., on the west and "Old Water Tank Ditch" on the east, and the right-of-way of the O. R. & N. on the south and the Coeur d'Alene River on the north.

On the above-described land is a barn, oil-house, blacksmith-shop, storehouse and wagon-shed. The last above-described land is where the first mill of the Land Lumber Company was situated, *where* was destroyed by fire August 21, 1908; along the Coeur d'Alene River in front of the above-described land are piling and booms which were used by the Lane Lumber Company for receiving and storing logs.

Lot three, block five, village of Harrison.

Two three-room cottages on the above land, rented at \$6 and \$9 per month.

I understand that the quantities specified in said *scheduled* and inventory and above referred to may

not be in all respects accurate, and that there may be more or less of the several items mentioned therein than are specified in said inventory and schedule. Whatever the quantities may actually be, all of the property of the company, with the exceptions hereinabove specified, are covered by this proposal. The prices set opposite and several items mentioned in said schedule are not deemed accurate by the undersigned, but the bid is made as a lump bid on the property as a whole. [9]

For this property the undersigned offers you the sum of \$69,519.40, of which sum I deposit with you at this time the sum of \$1,000.00 as evidence of my good faith, to be returned to the undersigned in case you fail to secure the acceptance and confirmation by the court to this proposal. The further sum of \$39,000.00 is to be paid by the undersigned on July 24, 1912, and the further sum of \$29,519.40 is to be paid September 24th, 1912, at which time you are to convey to me all of the property aforesaid by good and sufficient deeds and instruments of conveyance, and deliver actual possession thereof to the undersigned.

Upon the making of the payment of the further sum of \$39,000 I agree that the insurance now on the said property shall be properly endorsed so as to make the same payable in the first instance to you as trustee in bankruptcy as your interest may appear, in order to protect your estate in the payment of the further sum of \$29,519.40; the remaining interest in the insurance to be carried, of course, on my behalf.

From the foregoing property it is probable that an exception must be made of all the 16-ft. fir and tamarack logs of the said Lane Lumber Company, Limited. By an order entered in the above-entitled court and cause on the 13th day of June, 1912, a contract of sale of all of the 16-ft. fir and tamarack logs, estimated at 1,000,000 or over, and located on the Coeur d'Alene River in the boom works at or near Harrison, and in Lake Killarney, Idaho, were authorized to be sold by the trustee to the Atlas Tie Company, at the rate of \$7.50 per M. Should such transaction be consummated by the Atlas Tie Company, the undersigned shall receive credit in his bid for the full amount of logs so sold at the rate of \$7.50 per M., said credit to be applied on the last of the payments to be made by the undersigned to you as trustee. Should, however, the Atlas Tie Company fail or neglect to consummate said sale, then and in that event the said logs may be delivered by said good and sufficient instruments of conveyance and by delivery of possession thereof to the undersigned without deduction on account.

Within fifteen days from this date you are to deliver to my attorneys, Messrs. Graves, Kiser & Graves, at Spokane, Washington, abstracts of title covering all of the real property herein described, showing unencumbered title clear of encumbrances save those mentioned herein, for the examination of my attorneys. Should their examination disclose that the title to any of the tracts is defective in so substantial a manner as to affect my willingness to go on with this transportation, I have the right,

within fifteen days after receipt of said abstracts, to require you either to clear said title or to refund me the initial payment, in case you are unable to do so. Should this proposal to purchase be accepted by and approved by the Court, it is with the distinct and express understanding of all parties concerned that the damage for failure on my part to complete the fulfillment of any part of this proposal is to be limited to such payments as have been made.

Dated this 24th day of June, 1912.

(Signed) DUVAL JACKSON. [10]

Exhibit "B."

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

No. 449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

Proposal to Purchase Certain Other Property.

Before LAWRENCE L. LEWIS, Referee in
Bankruptcy.

To Samuel L. Boyd, Trustee in Bankruptcy of Lane
Lumber Company, Limited;

The undersigned hereby propose to purchase of
you, as such trustee, all of the timber lands of the
Lane Lumber Company, Limited.

A description of said timber lands which you have
handed to me and in reliance on which I have made
this proposal, is as follows, to wit:

Township 48-1 E.

E. $\frac{1}{2}$ SE. $\frac{1}{4}$ S. 5..... 80 Acres

There is some dispute relative to the title of this land and it cannot be finally determined until the differences between the State Bank of Commerce, of Wallace, Idaho, and the Lane Lumber Company, Limited, a Corporation, Bankrupt, are adjusted. Record title in State Bank of Commerce. Receiver notified not to transfer.

Township 49-1 E.

S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ S. 17..160 Acres

Township 45-1 W.

SW. $\frac{1}{4}$ S. 28.....160 Acres

Township 48-1 W.

NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and S. $\frac{1}{2}$

of SW. $\frac{1}{4}$ S. 12.....160 Acres.

Township 49-1 W.

SE. $\frac{1}{4}$ S. 3.....160 Acres

SW. $\frac{1}{4}$ S. 3.....160 Acres

SW. $\frac{1}{4}$ S. 5.....160 Acres

W. $\frac{1}{2}$ SW. $\frac{1}{4}$ S. 22..... 80 Acres

SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and E. $\frac{1}{2}$

SW. $\frac{1}{4}$ S. 27.....160 Acres

Deeded to Ada D. Crosfeld, subject to bond.

Township 47-2 W.

Lot 5 S. 1.....42.29 Acres

Lot 6 S. 1.....41.77 Acres

Lot 7 S. 1.....41.07 Acres

Lot 8 S. 1.....40.35 Acres

Township 48-2 W.

W. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ S. 2.....120 Acres

SE. $\frac{1}{4}$ NE. $\frac{1}{4}$. N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$

SE. $\frac{1}{4}$ S. 8.....	160 Acres
E. $\frac{1}{2}$ SE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ S. 9.....	120 Acres
SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ S. 9....	80 Acres
Lot 1 S. 15.....	35.75 Acres
N. $\frac{1}{2}$ SE. $\frac{1}{4}$ S. 16.....	80 Acres
N. $\frac{1}{2}$ SE. $\frac{1}{4}$ S. 16.....	80 Acres

[11]

Township 49-2 W.

SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ S. 26.....	40 Acres
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Township 49-2 W.

E. $\frac{1}{2}$ NW. $\frac{1}{4}$ S. 35.....	80 Acres
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Township 48-3 W.

Lot 7 S. 31.....	42.80 Acres
Lot 8 S. 31.....	16.10 Acres
Lot 9 S. 31.....	20 Acres

Township 48-1 E.

NW. $\frac{1}{2}$ S. 1.....	160 Acres
E. $\frac{1}{2}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$	
SW. $\frac{1}{4}$ S. 26.....	160 Acres
E. $\frac{1}{2}$ SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$	
SW. $\frac{1}{4}$ S. 26.....	160 Acres
NE. $\frac{1}{4}$ S. 35.....	160 Acres
SE. $\frac{1}{4}$ S. 35.....	160 Acres

Township 49-1 E.

S. $\frac{1}{2}$ SW. $\frac{1}{4}$ S. 13.....	80 Acres
NE. $\frac{1}{4}$ S. 14.....	160 Acres
NW. $\frac{1}{4}$ S. 14.....	160 Acres
SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ S. 14.....	40 Acres
E. $\frac{1}{2}$ NE. $\frac{1}{4}$ S. 15 and E. $\frac{1}{2}$ SE. $\frac{1}{4}$ S. 15...	160 Acres
NE. $\frac{1}{4}$ S. 22.....	160 Acres
NW. $\frac{1}{4}$ S. 22.....	150 Acres

There is some dispute repative to title of NW. $\frac{1}{4}$ S. 22 and it cannot be finally determined until the differences between the State Bank of Commerce, of Wallace, Idaho, and the Lane Lumber Company, Limited, a corporation, Bankrupt, are adjusted. Re-core title in State Bank of Commrce. Receiver notified not to transfer.

S. $\frac{1}{2}$ NE. $\frac{1}{4}$ S. 24.....80 Acres

NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ S. 24.....40 Acres

SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ S. 24.....40 Acres

W. $\frac{1}{2}$ SE. $\frac{1}{4}$ S. 24.....80 Acres

Township 44-2 E.

NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ S. 29.....40 Acres

Township 47-2 E.

W. $\frac{1}{2}$ NW. $\frac{1}{4}$ S. 22.....80 Acres

N. $\frac{1}{2}$ SW. $\frac{1}{4}$ S. 22.....80 Acres

SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ S. 27.....40 Acres

NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ S. 28.....40 Acres

SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$

SE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ S. 30....160 Acres

E. $\frac{1}{2}$ NW. $\frac{1}{4}$ S. 34.....80 Acres

SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ S. 34.....40 Acres

N. $\frac{1}{2}$ SE. $\frac{1}{4}$ S. 34.....80 Acres

Lot 1 S. 34.....40.91 Acres

Township 47-2 E.

Lot 4 S. 35.....40.77 Acres

Township 49-2 E.

SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and W. $\frac{1}{4}$

NW. $\frac{1}{4}$ S. 1.....160 Acres

W. $\frac{1}{2}$ NW. $\frac{1}{2}$ S. 4.....80 Acres

SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$

NW. $\frac{1}{4}$ S. 6.....160 Acres

Lot 10, S. 19.....37.56 Acres
W. $\frac{1}{4}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW.

$\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$ S. 20.....280 Acres
NW. $\frac{1}{4}$ S. 21.....160 Acres

Lot 1 S. 30.....40.63 Acres
NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, W. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$

SEC. S. 33.....160 Acres
N. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ NW. $\frac{1}{4}$ S. 34.....160 Acres

Township 50-2 E.

W. $\frac{1}{2}$ SE. $\frac{1}{4}$ S. 3.....80 Acres
E. $\frac{1}{2}$ SE. $\frac{1}{4}$ S. 4.....80 Acres

SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ S. 6....80 Acres
Lot 3, S. 6.....45.99 Acres

Lot 5, S. 6.....37.38 Acres
S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$ S. 20.....160 Acres

NE. $\frac{1}{4}$ S. 27.....160 Acres
W. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{2}$

SE. $\frac{1}{4}$ S. 8.....160 Acres
N. $\frac{1}{2}$ NE. $\frac{1}{4}$, and N. $\frac{1}{2}$ NW. $\frac{1}{4}$ S. 29....160 Acres

E. $\frac{1}{2}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$

NW. $\frac{1}{4}$ S. 35.....160 Acres
SE. $\frac{1}{4}$ S. 35.....160 Acres

Township 44-3 E.

NE. $\frac{1}{4}$ S. 36.....160 Acres
[12]

As an evidence of my good faith in making this bid, I hand you herewith the sum of \$1,000.00 and I offer you for the said timber land the sum of \$70,-480.60, payable \$35,000 on December 24th, 1912, and \$34,480.60 March 24, 1913, each of said payments to bear interest at the rate of six per cent per annum from July 24th, 1912, interest to be paid at maturity

on each payment.

I have had no opportunity to determine your title to these timber lands, or to determine the quantity of timber upon them, and I am therefore compelled to rely upon the representations contained in the above specifications and the prices set forth in your schedule. It is understood and agreed as a condition of this proposal that I have until September 24th in which to examine the titles and to scale the timber lands in order to determine whether or not the estimates of values comprehended in said inventory are correct, and whether or not the title to said land is as represented in said schedule. If I find it to fail in a substantial particular thereof I am entitled to have my original payment of \$1,000 returned to me on demand on or before December 24th, 1912. No trifling variation shall be sufficient to vitiate this proposal on my part.

At the time of making the last payment, you are to convey to me the whole of the property therein scheduled by good and sufficient deeds and instruments of conveyance, and to deliver to me the right of possession of the whole of said lands and every part thereof save only the property referred to as being in litigation. As to this, quitclaim deeds of your interest will be sufficient.

Should you fail to accept this bid or fail to have your acceptance confirmed by the Court and be thereby not enabled to consummate to the conditions specified in this proposal, then and in that event, you are to return to me the said sum of \$1,000 hereby deposited with you as evidence of good faith.

Within thirty days from this date you are to furnish abstracts to me showing unencumbered title clear of encumbrances, save those mentioned herein, for the examination of my attorneys. Should their examination disclose that the title to any of the tracts is defective in so substantial a manner as to effect my willingness to go on with this transaction, I have the right within fifteen days after receipts of said abstracts, to require you either to clear said title or to refund me the initial payment in case you are unable to do so. Should this proposal to purchase be accepted by you and approved by the court, it is with the distinct and express understanding of all parties concerned that the damage for failure on my part to complete the fulfillment of any part of this proposal is to be limited to such payments as have been made.

Dated this 24th day of June, 1912.

[Signed] DUVAL JACKSON. [13]

Exhibit "C."

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

No. 449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

Petition for Confirmation of Sale of Bankrupt's Real and Personal Property.

To Honorable LAWRENCE L. LEWIS, Referee in Bankruptcy.

The petition of Samuel L. Boyd, trustee, respectfully shows:

That on February 6th, 1912, your petitioner filed a petition for the sale of the real and personal property herein; that thereafter, after due notice to all creditors, this court on March 2d, 1912, made and filed an order "Approving and Authorizing Private Sale of the Real and Personal Property by the Trustee, Subject to the Approval of the Court, After Due Notice to all Creditors":

That thereafter your petitioner disposed of the following parts and parcels of said estate:

Southwest Quarter (SW. $\frac{1}{4}$) of Sec. 28, Twp. 45 N., R. 1 W., B. M., Kootenai County, Idaho, for \$2,537, the appraised value;

Northeast Quarter of the Northwest Quarter (NE. $\frac{1}{4}$ NW. $\frac{1}{4}$) of Sec. 29, Twp. 45 N., R. 2 E., B. M., Shoshone County, Idaho, for \$1,625, the appraised value.

Northeast Quarter (NE. $\frac{1}{4}$) of Sec. 36, Twp. 44 N., R. 3 E., B. M., Shoshone County, Idaho, for \$5,056, the appraised value.

The wood set forth on page 14 of said order, appraised at \$25, has been used and disposed of by your petitioner during the administration of the estate;

Thirty-Three (33) sacks of rolled barley and one hundred ninety-three (193) sacks of oats, set forth on

page 27, of said order, have been fed to the live stock of the bankrupt;

The new houseboat, set forth on page 27 of said order, has been sold for the appraised value;

The shack at the mouth of Killarney Ditch, set forth on page 36 of said order, has been sold;

1,075,000 feet of the mixed logs, set forth on page 37 of the said order, have been sold, leaving a balance of about 1,000,000 feet on hand;

The blacksmith outfit situated at Camp "K," Killarney Lake, Kootenai County, Idaho, set forth on page 36 of said order, has been sold at its appraised value, \$25.

Two sets of logging sleighs, without chains, set forth on page 27 of said order, have been sold for more than their appraised value, to wit, \$120.

The Burroughs Adding Machine, \$200 equity, has been increased \$——, which amounts was paid thereon by the Trustee, vesting absolute title thereto in him, and the value thereof is figured at \$375 in said bid;

Goods received from the Anderson Lumber and Hardware Co. as part payment of their open account, stored in the granary at Harrison, Idaho, and not included in the Inventory, Appraisement, Petition for Order of Sale, have been included as an asset [14] of the value of \$750 in the bid;

That your petitioner has received two bids on and for the residue and remainder of said estate by Duval Jackson, of Kansas City, Missouri, bidding therefor the sum of One Hundred Forty Thousand (\$140,000.00) Dollars, which is more than 75% of the ap-

praised value of said property, as disclosed by the Appraisers' report on file; that said original proposals to purchase were filed herein on June 27th, 1912; that full, true and correct copies of said proposals to purchase are hereto attached made a part hereof, marked Exhibit "A" and "B"; Exhibit "A" being the proposal to purchase all of the real and personal property of the bankrupt, except the timber lands; Exhibit "B" being the proposal to purchase the timber lands of the bankrupt, excluding all the other real and personal property;

That in order to deliver said property to the purchaser it is necessary for your petitioner to have given ten days' notice, as required in the order of sale herein, given to all the creditors, so that the creditors herein may determine whether or not they desire for said sale to be confirmed by this Court.

Your petitioner is of the opinion and verily believes that a larger sum than is above bid cannot be obtained, and advises that the said real and personal property be sold and delivered to the bidder, for the reason that said sawmill, planing-mill and personal property have been and are rapidly deteriorating in value; that the estate has been and is now to considerable expense in keeping said property insured from fire, paying the taxes thereon, and in keeping watchmen to protect the same; that this estate cannot be kept intact any longer without great expense and risk from fire; all of which expense will continue unless said sale is confirmed and the property converted into money.

That in the opinion of your petitioner, said estate

is unlikely to produce better results and he verily believes that each of the proposals to purchase should be accepted and the sale confirmed;

WHEREFORE your petitioner respectfully prays that notice be given to the creditors and that an order be made confirming said sale and authorizing him to deliver proper deeds and instruments of conveyance to said bidder, for the said properties upon the terms and conditions as set forth in said proposals to purchase and for such further relief as to the Court may seem just and proper.

SAMUEL L. BOYD,
Petitioner.

State of Idaho,
County of Kootenai,—ss.

Samuel L. Boyd, the petitioner and trustee mentioned and described in the foregoing petition, does hereby make solemn oath that the statements contained therein are true according to the best of his knowledge, information and belief.

SAMUEL L. BOYD,
Trustee.

Subscribed and sworn to before me this 27th day of June, 1912.

JOSEPH B. HOGAN,
Notary Public. [15]

Exhibit "D."

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

No. 449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,

Involuntary Bankrupt.

Notice of Hearing on Order to Show Cause.

To the Creditors and all Other Persons in Interest
of the Lane Lumber Company, Limited, a Corporation, of the City of Harrison, in the County of Kootenai, State of Idaho and District Aforesaid, a Bankrupt:

Whereas, to wit, on the 27th day of June, A. D. 1912, the petition of the trustee of said estate for the approval and confirmation of a proposed sale of the residue and remainder of the property, both real and personal, all and singular, of the above named bankrupt, as is more fully set forth and described in said petition, and proposed sale being for seventy-five per cent (75%) of the appraised value of said property, as disclosed by the appraisers' report on file herein, having been duly filed in said cause, and

Whereas, on, to wit, the 28th day of June, A. D. 1912, an order to show cause why the prayer of said petition should not be granted, was duly made and entered herein;

Notice is hereby given that on, to wit, Monday, the 15th day of July, A. D. 1912, at 11 o'clock in the forenoon of said day, at the law offices of the under-

signed referee in bankruptcy, located in the Otterson block in the city of Coeur d' Alene, State and district aforesaid, a hearing on said order to show cause will be held, together with such other matters as may properly come on to be heard at said time.

Dated at Coeur d' Alene, Idaho, in said district, this 29th day of June, A. D. 1912.

LAWRENCE L. LEWIS,
Referee in Bankruptcy. [16]

Exhibit "E."

**Telegraphic [Withdrawal, Addressed to Trustee, of
Proposals to Purchase Certain Property].**

TELEGRAM.

July 10th, 1912.

Samuel L. Boyd,

Trustee in Bankruptcy of the Lane Lumber
Company,

Coeur d' Alene, Idaho.

I withdraw my two proposals under date of June Twenty-fourth, Nineteen Hundred and Twelve, for the purchase of the timber lands real estate, property and assets of the Lane Lumber Company, Limited, a Corporation, Involuntary Bankrupt.

All bids or propositions made by me are hereby withdrawn and have also sent you notice to that effect by mail to-day.

DUVAL JACKSON. [17]

Exhibit "F."

**Telegraphic [Withdrawal, Addressed to Referee, of
Proposals to Purchase Certain Property].**

TELEGRAM.

To Lawrence L. Lewis,
Referee in Bankruptcy,
District of Idaho,
Northern Division,
Coeur d' Alene, Idaho.

I withdraw my two proposals under date of June Twenty Fourth, Ninteen Hundred and Twelve, for the purchase of the timber lands, real estate, property and assets of the Lane Lumber Company, Limited, a corporation, Involuntary Bankrupt.

All bids or propositions made by me are hereby withdrawn and have also sent you notice to that effect by mail to-day.

DUVAL JACKSON. [18]

Exhibit "G."

**[Withdrawal, Addressed to Trustee, of Proposals to
Purchase Certain Property.]**

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

No. 449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

Before LAWRENCE L. LEWIS, Referee in Bankruptcy.

To Samuel L. Boyd, Trustee in Bankruptcy of the
Lane Lumber Company, Limited:

Under date of the 24th day of June, 1912, I made a certain proposal to purchase of you, subject to the confirmation and approval of the above-entitled court in the above-entitled cause all the property and assets of the Lane Lumber Company, Involuntary Bankrupt, of whatsoever kind, character or description, excepting only its timber lands, and including all of the property save only said timber lands scheduled in the schedule and inventory annexed to your petition to sell real estate and personal property filed in the above-entitled court on the — day of February, 1912, which said petition with schedule and inventory attached, now on file in said court, and reference to which is hereby made, excepting only from said schedule and inventory the timber lands above referred to and certain assets which have been sold, or otherwise disposed of by you, report of which are likewise now on file in the above-entitled cause and for a more specific description of said property and proposal I hereby refer to said proposal made by me.

I hereby notify you that I desire to and do hereby withdraw said proposal to purchase property, and withdraw each and all the proposals and propositions made in reference to said property and each and every part of the same, and hereby withdraw from your consideration any proposal of purchase or bid heretofore made relative to the purchase *to* any real estate, property or assets or any part thereof, of the Lane Lumber Co., Limited, a corporation, Involuntary Bankrupt, and hereby request that the

amount deposited by me with said proposal be returned to me.

Dated this 10th day of July, 1912.

DUVAL JACKSON. [19]

Exhibit "H."

**[Withdrawal, Addressed to Referee, of Proposals to
Purchase Certain Property.]**

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

No. 449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,

Involuntary Bankrupt.

Before LAWRENCE L. LEWIS, Referee in Bank-
ruptcy.

To Samuel L. Boyd, Trustee in Bankruptcy of Lane
Lumber Company, Limited.

Under the date of the 24th day of June, 1912, I made a proposal to purchase of you, as trustee, subject to the confirmation and approval of the above-entitled court, all of the timber lands of the Lane Lumber Company, Limited, for a full description of said lands I hereby refer to said proposal.

I hereby notify you that I desire to and do hereby withdraw said proposal to purchase property, and withdraw each and all proposals and propositions made in reference to said property and each and every part of the same, and hereby withdraw from your consideration any proposal of purchase or bid heretofore made relating to the purchase of any of

the timber lands, property, or assets or any part thereof, of the Lane Lumber Company, Limited, a corporation, Involuntary Bankrupt, and hereby request that the amount deposited by me with said proposal be returned to me.

Dated this 10th day of July, 1912.

DUVAL JACKSON. [20]

Exhibit "I."

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

No. 449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,

Involuntary Bankrupt.

**Order of Referee Confirming Private Sale of the
Real and Personal Property of the Bankrupt to
Duval Jackson, Excepting Lumber and 300,000
Feet of Cedar Logs, etc.**

Samuel L. Boyd, trustee herein, on February 6th, 1912, filed a duly verified petition praying for an order permitting him to sell at private sale, free and clear of all liens and encumbrances, the real and personal property of the bankrupt; that on February 7th, 1912, the Referee herein, caused due and legal notice to be given to all creditors and lien claimants of the bankrupt setting the hearing on said petition for February 20th, 1912; that on February 20th, 1912, upon application of some of the creditors of the bankrupt, said hearing was continued to and until February 24th, 1912; that on February 24th, 1912,

the hearing was had on said petition by virtue of said notice;

That on March 2d, 1912, an order was made and entered herein approving and authorizing private sale, free and clear of all liens and encumbrances, of all of the real and personal property of the bankrupt by the trustee, subject to the approval of the Court, after due notice to all creditors;

That on June 27th, 1912, the trustee herein filed a duly verified petition for the confirmation of the sale of all of the remainder of the real and personal property of the bankrupt that in accordance with the order of the Court heretofore made and entered herein on July 1st, 1912, due and legal notice was given to all the creditors and lien claimants of the bankrupt, setting the hearing on said petition for the confirmation of the sale of all of the remainder of the real and personal property of the bankrupt referred to in said petition filed June 27th, 1912; said hearing being set for July 15, 1912; that on July 15, 1912, said hearing was had in pursuance of said notice and no objections were made to the sale of said real and personal property referred to in said petition filed June 27th, 1912; the Court being fully advised in the premises and deeming it for the best interests of the estate did and does hereby confirm the sale of said real estate and personal property referred to and described in said petition save and except 300,000 feet of cedar logs and all of the lumber of the bankrupt described on pages 1 to 18, inclusive, of the Appraisers' Report filed herein; and it is

Ordered that the appraised value of the said logs and lumber shall be deducted from the purchase price to be paid by said Duval Jackson.

It is further ordered that upon the receipt of the said total sum of \$107,733.35 that the trustee execute and deliver to said Duval Jackson, the proper deeds and bills of sale for the above referred to real and personal property, free and clear of all liens and encumbrances;

It is further ordered that said trustee keep an accurate account thereof and file the same with the Referee.

Dated July 15th, 1912.

LAWRENCE L. LEWIS,
Referee. [21]

Exhibit "J."

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

No. 449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,

Involuntary Bankrupt.

**Order of Referee Confirming Sale of Lumber, Lath
and Molding to A. W. Lammers, etc.**

Samuel L. Boyd, trustee herein, on February 6th, 1912, filed his duly verified petition praying for an order permitting him to sell at private sale, free and clear of all liens and encumbrances, the real and personal property of the bankrupt; that on February 7th, 1912, the Referee herein caused due and legal

notice to be given to all of the creditors and lien claimants of the bankrupt, setting the hearing on said petition for February 20th, 1912; that on February 20th, 1912, on application of some of the creditors of the bankrupt, said hearing was continued to and until February 24th, 1912; that on February 24th, 1912, the hearing was had on said petition by virtue of said notice;

That on March 2d, 1912, an order was made and entered herein approving and authorizing private sale, free and clear of all liens and encumbrances, of all the real and personal property of the bankrupt, as a whole or in parcels, by the trustee, subject to the approval of the Court, after due notice to all creditors;

That on July 12th, 1912, the trustee herein filed a duly verified petition for the confirmation of the sale of all of the lumber, lath and molding of the bankrupt, situated at Harrison, Kootenai County, Idaho; that in accordance with the order of this Court heretofore made and entered herein on July 12th, 1912, due and legal notice was given to all the creditors and lien claimants of the bankrupt, setting the hearing on said petition for the confirmation of the sale of all of said lumber, lath and molding of the bankrupt referred to in said petition, said hearing being set for July 26th, 1912; that on July 26th, 1912, said hearing was held in pursuance of said notice and no objection was filed by any creditor or person in interest to the sale of said lumber, lath and molding referred to in said petition; the Court being fully advised in the premises and deeming it for the

best interests of the estate, did and does hereby confirm the sale of said personal property, consisting of lumber, lath and molding, as described in trustee's petition for confirmation of this sale;

It is further ordered that upon receipt of said sum of Twenty-One Thousand (\$21,000.00) Dollars, being the total purchase price, that the trustee execute and deliver to said A. W. Lammers the proper bill of sale for the above referred to lumber, lath and molding, free and clear of all liens and encumbrances.

It is further ordered that upon the receipt of Ten Thousand Dollars (\$10,000.00) on or before Saturday, July 27th, 1912, said A. W. Lammers shall by this order be empowered to enter upon the premises, take possession of the personal property consisting of lumber, lath and molding and manufacture the same into merchantable products, and have the use of the planing-mill, power plant and equipment necessary to machine and load said lumber, lath and molding, including the use of one or two teams of horses, if necessary, free of any additional charge, with the express [22] understanding that said A. W. Lammers pay the cost of all labor used in the milling and loading of the said personal property; furnish his own oil and waste and leave said planing mill and equipment in as good order and condition as the same now is, reasonable wear and tear excepted; that the said A. W. Lammers shall have the use of the said planing-mill and premises of the bankrupt for the purpose aforesaid until January 1st, 1913, without any additional charge;

That the deferred payments on said purchase price

of Twenty-one Thousand (\$21,000.00) Dollars, besides the Ten Thousand (\$10,000.00) Dollars payment referred to shall be made as follows:

On or before October 10th, 1912. . . . \$3500

On or before November 9th, 1912. . . . 3500

On or before December 10th, 1912. . . . 4000

In the event of total or partial destruction of said planing-mill by fire or the elements, the deferred payments shall be extended a reasonable length of time in order to give said purchaser an opportunity to handle the stock elsewhere;

Immediately upon taking possession of the said planing-mill and premises adjoining the same, the purchaser shall take out employer's insurance on all of the men in his employ during all times that he operates said planing-mill, and pay the premium or premiums thereon;

That the trustee shall deliver to said purchaser insurance policies on said lumber, lath and molding in the total sum of Twenty-one Thousand (\$21,000.00) Dollars, made payable to the said purchaser as his interest may appear in the amount of money which said purchaser has advanced on the purchase price of said escrow with the bill of sale.

Dated this 26th day of July, 1912.

LAWRENCE L. LEWIS,

Referee in Bankruptcy.

[Endorsed]: Filed Nov. 23, 1912. A. L. Richardson, Clerk. [23]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

#449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

**Answer to Petition of Duval Jackson for Refund of
\$2,000.00.**

Before LAWRENCE L. LEWIS, Referee in
Bankruptcy.

Now comes Samuel L. Boyd, trustee of the Lane Lumber Company, Limited, bankrupt, and in answer to the petition of Duval Jackson for refund of Two Thousand (\$2,000.00) Dollars denies, admits and alleges as follows:

1.

Admits paragraph one.

2.

Admits paragraph two, but alleges that the reason and only reason your trustee and this Court did not confirm the bids made by the petitioner in full was on account of his withdrawal before the time set for confirmation; that the proposals to purchase submitted by petitioner provided:

“Should this proposal to purchase be accepted by you and approved by the Court, it is with the distinct and express understanding of all parties concerned that the damage for failure on my part to complete the fulfillment of any part of this proposal, is to be

limited to such amounts as have been made.”

3.

Admits paragraph three.

4.

Admits paragraph four.

5.

Admits paragraph five. [24]

6.

Admits paragraph six, but alleges that the reason therefor is set forth in the petition for confirmation of the sale of the lumber belonging to the bankrupt filed herein on July 12th, 1912, and as set forth in the petition for confirmation of the sale of 300,000 feet of cedar logs, at \$7.50 per M., belonging to the bankrupt, filed herein on July 30th, 1912.

Further answering said petition your trustee alleges that said Duval Jackson well knew that on August 1st, 1912, there would be due and payable to the Northern Trust Company of Chicago, Illinois, the sum of Twelve Thousand Five Hundred (\$12,500) Dollars and interest, on the bonded indebtedness of the bankrupt, and he further knew that your trustee had no money on hand with which to pay said indebtedness and that your trustee was relying upon the fulfillment of his purchase in order to raise said sum for the said purpose; that your petitioner did everything on his part to be done as required by said proposals to purchase; that nothing was done by your trustee to affect the title of the property covered by petitioner's bid until after the petitioner attempted to withdraw his bid; that the reason your petitioner demanded and received Two Thousand Dollars

(\$2,000) earnest-money from said Duval Jackson, was to assure the estate of the good faith of said Duval Jackson; that it was agreed between your trustee and said Duval Jackson if said sale was not consummated on account of any default on the part of Duval Jackson, that he should forfeit the said Two Thousand Dollars (\$2,000), which agreement was set forth in writing and is a part of the bids.

WHEREFORE, your trustee prays that said petition be dismissed, that the Two Thousand Dollars (\$2,000) earnest-money be retained by your trustee, and that said Duval Jackson go hence without day.

SAMUEL L. BOYD,

Trustee.

By E. N. LA VEINE,

Attorney for Trustee. [25]

State of Idaho,

County of Kootenai,—ss.

E. N. La Veine, being first duly sworn, deposes and says, that Samuel L. Boyd, trustee herein, is without State of Idaho and is unable to make this verification personally; that before leaving the State of Idaho he instructed this affiant, as his attorney, to make the foregoing Answer; affiant does hereby make solemn oath that the statements contained in the foregoing Answer are true according to the best of his knowledge, information and belief.

E. N. LA VEINE,

Attorney for Trustee.

Subscribed and sworn to before me this 22d day of October, 1912.

[Seal]

W. F. McNAUGHTON,
Notary Public.

[Endorsed]: Filed Nov. 23, 1912. A. L. Richardson, Clerk. [26]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.

**Order [of Referee Granting Petition of Duval
Jackson].**

The Petition of Duval Jackson, having heretofore come on for hearing before the Court, and the same having submitted on brief by the petitioner, and the brief of the trustee, also reply brief of petitioner, and the Court having taken the same under advisement and being fully advised in the premises, and for the following reasons, to wit:

1. The offers and each of them to purchase the property of the Lane Lumber Company, except the timber and the cut-over lands, were never accepted or confirmed by the Court as submitted;

2. That Duval Jackson, the petitioner, had the legal right to withdraw his bids and each of them, prior to their acceptance by the Court.

Therefore, it is hereby ordered, that the petition of Duval Jackson be, and the same is hereby granted, and the said Samuel L. Boyd, trustee, is

hereby directed to pay the petitioner Duval Jackson, or his attorneys, Reed & Boughton, the Two Thousand (\$2,000.00) Dollars heretofore deposited with the said trustee.

Given under my hand this 11th day of November, A. D. 1912.

L. L. LEWIS,
Referee in Bankruptcy.

[Endorsed]: Filed Nov. 23, 1912. A. L. Richardson, Clerk. [27]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,
Involuntary Bankrupt.
DUVAL JACKSON,

Petitioner,

vs.

SAMUEL L. BOYD, Trustee of the LANE LUM-
BER COMPANY, Limited, a Corporation,
Bankrupt.

Findings of Fact and Conclusions of Law.
FINDINGS OF FACT.

The petition in this cause by Duval Jackson, on review by the trustee, demanding the return by the trustee of \$2,000.00 paid on the purchase price of the property of the bankrupt, having come on regularly for the hearing before the Court without a jury, on

petition of the trustee for review of the order made herein by the referee on the 21st day of November, 1912, requiring the trustee herein to refund \$2,000.00 to Duval Jackson, from the facts presented by the pleadings, all allegations therein not denied being admitted by the parties, the Court finds the facts as follows, to wit:

1.

That on the 24th day of June, 1912, Duval Jackson made certain proposals to purchase the property of the above-named bankrupt, which proposals were in writing, copies of which are attached to the petition of Duval Jackson and marked Exhibits "A" and "B";

2.

That in pursuance of said proposals, and according to the terms thereof, said Duval Jackson deposited with the trustee the sum of \$2,000.00, as evidence of his good faith. [28]

3.

That thereafter and on the 27th day of June, 1912, Samuel L. Boyd, trustee herein, made and filed a petition approving said sale and asking for the confirmation thereof by this Court; a copy of which is attached to the petition of Duval Jackson and marked Exhibit "C."

4.

That on the 29th day of June, 1912, a notice of hearing was given by said Referee to all of the creditors of the bankrupt, setting Monday, the 15th day of July, 1912, at 11 o'clock A. M., as the time for hearing said petition; a copy of which said notice is

attached to the petition of Duval Jackson and marked Exhibit "D."

5.

That thereafter, and on the 10th day of July, 1912, said Duval Jackson sent a telegram to the trustee of the above-entitled estate, withdrawing said proposals to purchase the property of said bankrupt, without showing any cause therefor; a copy of which is attached to the petition of Duval Jackson and marked Exhibit "E."

6.

That on the same day said Duval Jackson also sent a telegram to the said Referee withdrawing said bids; a copy of which is attached to the petition of Duval Jackson and marked Exhibit "F."

7.

That on the 10th day of July, 1912, said Duval Jackson mailed two written withdrawals of the proposals to purchase the property of said bankrupt, for the sum of \$140,000; copies of which are attached to the petition of Duval Jackson and marked Exhibits "G" and "H." [29]

8.

That said written withdrawals were received by the Referee on the 15th day of July, 1912, at 8:45 o'clock A. M., two hours and fifteen minutes before the hour set for the meeting of the creditors called for the purpose of confirming said sale.

9.

That on the 15th day of July, 1912, notwithstanding the notices of the withdrawals of said proposals to purchase the property of the bankrupt, an order

was made by the Court herein, confirming the sale of the property mentioned in said proposals to purchase, excepting certain lumber and logs mentioned in said notice of sale; a copy of said Order of Confirmation is attached to the petition of Duval Jackson and marked Exhibit "I."

10.

That thereafter on *the* July 26th, 1912, said Referee confirmed the sale of about 300,000 feet of cedar logs of said bankrupt, and all of the lumber of said bankrupt, described on pages 1 to 18, inclusive, of the Appraisers' Report filed in this court, said lumber and logs being the same as excepted from the Order of Confirmation of the Sale to the said Duval Jackson that a copy of said Order Confirming the Sale of said Lumber is attached to the petition of Duval Jackson and marked Exhibit "J."

11.

That the reason the Referee excepted said lumber and logs from the Order Confirming said Sale is set forth in the petition for confirmation thereof heretofore referred to.

12.

That said Duval Jackson well knew that on August 1st, 1912, there would be due and payable to the Northern Trust Company of Chicago, Illinois, the sum of \$12,500 and interest, on the bonded indebtedness of the bankrupt, and that he further [30] knew that the trustee had no money on hand with which to pay said indebtedness and that the trustee was relying upon the fulfilment of said Duval Jackson's purchase in order to raise said sum for said purpose.

13.

That the trustee herein did everything on his part to be done as required by said proposals to purchase.

14.

That nothing was done by the trustee to affect the title to the property covered by said Duval Jackson's bid until after said Duval Jackson attempted to withdraw it.

15.

That the trustee demanded and received said \$2,000 earnest-money from said Duval Jackson for the purpose of assuring the estate of the good faith of said Duval Jackson.

16.

That it was agreed between the trustee and said Duval Jackson if said sale was not consummated on account of any default on the part of said Duval Jackson, that he should forfeit the said \$2,000, which agreement is set forth in writing and is a part of said bids heretofore referred to.

CONCLUSIONS OF LAW.

As a conclusion of law from the foregoing facts, the Court finds that the Referee's order complained of by the trustee should be reversed, vacated and set aside, and costs taxed against said Duval Jackson.

Dated this 3d day of December, 1912.

(Signed) FRANK S. DIETRICH,

District Judge.

[Endorsed]: Filed Dec. 6th, 1912. A. L. Richardson, Clerk. [31]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,

Involuntary Bankrupt.

Memorandum of Decision on Petition for Review.

December 3, 1912.

E. N. LA VEINE,

Attorney for the Trustee in Bankruptcy.

REED & BOUGHTON,

Attorneys for Claimant, Duval Jackson.

DIETRICH, District Judge:

On November 11, 1912, the referee in bankruptcy made an order requiring the trustee to refund to Duval Jackson the sum of \$2,000.00 which had theretofore been placed in his hands as a guarantee by Jackson of his good faith in making two separate bids for property belonging to the bankrupt estate; \$1,000.00 accompanied each one of the two bids. The trustee, feeling aggrieved by the order, has brought the record here upon a petition for review. It seems that before the referee the matter was submitted upon the claimant's petition, the trustee's answer thereto, and the pertinent files in the bankruptcy proceedings together with admissions by counsel of facts which are not clearly disclosed; no evidence was taken. The petition for review has been submitted in substantially the same manner here, and from record, together with the construction which it is agreed between counsel should be

placed thereon, the uncontroverted facts may be briefly stated as follows:

Of date June 24, 1912, the claimant delivered to the [32] trustee two separate written bids or offers for two distinct parcels of property belonging to the bankrupt estate, one parcel consisting largely, if not exclusively, of timber lands, and the other a saw-mill and a large amount of other property more or less directly connected therewith. With the exception of the description of the property the bids are in substantially the same form. Referring now to the one covering the timber lands, after proposing to buy the lands which are described, the bidder uses the following language: "As an evidence of my good faith in making this bid, I hand you herewith the sum of \$1,000, and I offer you for the said timber land \$70,480.60," etc. Later on in the instrument the following language is used: "Should you fail to accept this bid, or fail to have your acceptance confirmed by the Court, and be thereby not enabled to consummate the conditions specified in this proposal, then and in that event you are to return to me the said sum of \$1,000 hereby deposited with you as evidence of good faith," and the closing paragraph is as follows: "Should this proposal to purchase be accepted by you and approved by the Court, it is with the distinct and express understanding of all parties concerned that the damage for failure on my part to complete the fulfillment of any part of this proposal, is to be limited to such payments as have been made."

Other parts of the instrument setting forth certain

conditions are not presently material, for the reason that no question is raised as to the willingness or ability of the trustee to comply therewith.

On the 27th day of June, 1912, the trustee filed with the referee the original bids and also his report and petition showing that, so far as he was concerned, they were acceptable, and praying for a confirmation of the sale of the property accordingly. Thereafter, on the 28th day of June, the referee made an order fixing July 15th, 1912, as the time for the hearing upon the petition, and gave notice of such hearing to all [33] parties interested. Thereafter, on July 10th, Jackson sent two telegrams, one to the trustee and one to the Referee, advising them of his desire to withdraw his bids, and upon the same day he mailed a formal withdrawal in writing to the referee, which was received and filed on the morning of July 15th, 1912, a short time before the hour set for the hearing. Neither in the telegrams nor in the formal instrument of withdrawal was any reason given for the withdrawal. At the ensuing hearing the referee made an order confirming the sale of the timber lands in accordance with Jackson's bid theretofore, and also the sale of the mill and other property covered by the other bid, with the exception of certain logs and lumber included therein. Thereafter, on the 7th day of October, 1912, Jackson filed a petition praying for an order directing the trustee to return to him the \$2,000, to which in due time the trustee filed his answer. From these pleadings and the papers therein referred to, together with

the explanations and statements of counsel upon both sides, it appears that the only reason why the sale of the mill and the other property covered by one of the offers was not confirmed to Jackson fully in accordance with his offer, and certain logs and lumber were excepted was that, in order to meet an installment sooner thereafter to become due upon a certain secured claim against the estate, it was necessary for the trustee to procure funds and his only resource was a sale of the excepted property. And it further appears that had Jackson not declined to keep good his agreement, there would have been no exception in the order of confirmation, but both sales would have been confirmed strictly in accordance with the bids. In other words, the only reason for making the exception was the necessity imposed upon the trustee by reason of Jackson's inclination to keep good his offer, and of this exigency the latter had a full knowledge. It is doubtless true, as argued by counsel for the claimant, and it is here assumed, that if Jackson had not declined to [34] proceed the order of the referee confirming the sale to him of only a part of the property covered by the one bid would not have imposed upon him any obligation to complete the purchase under that bid. To bind him it would have been necessary to confirm the sale strictly in accordance with the offer, but in view of his notice to the trustee and the referee before the hour for the hearing that he would not complete the purchase and would not carry out the terms of his agreement, this feature of the case becomes unimportant. This notification made it unnecessary

for either the trustee or the referee to take any further steps; having given notice of his unwillingness to perform, Jackson cannot complain that the trustee did not thereafter go through the idle ceremony of procuring a confirmation of the sale. Incidentally it is to be noted that this objection, even were it valid, is applicable to only one of the bids, for one of the sales was confirmed in its entirety.

With this statement of the facts, we come to the consideration of the precise question, and the only question, certified for review by the referee, namely: Had Jackson the legal right to withdraw his bids prior to the confirmation by the referee? This, it is conceded by counsel for both sides, is the controlling feature of the case, and it is the only question which has been discussed. It is thought that the answer must be the negative. It is argued that an offer does not become a binding agreement until the same is accepted, and that one who makes a bid may withdraw the same at any time prior to its acceptance. Generally speaking, this may be conceded to be a correct statement of the law. It is further contended that there was no acceptance of or consideration for the offer or agreement, and therefore it never became binding upon Jackson. But upon an analysis of the facts and conditions the fallacy of these contentions will readily appear. The trustee was possessed of a large amount of property which he desired to turn into [35] money for the purpose of meeting the obligations of the estate. It appears not only that the estate was sorely in need of funds but that the property was deteriorating in value.

Informed as to the nature and value of the property, and of the desire of the trustee to sell the same, and of the trustee's need for funds Jackson executed and delivered to the trustee his written offer and together therewith placed in his hands \$1,000.00 as an assurance of his good faith and his intention to make the purchase in accordance with the stipulated conditions. The trustee accepted the offer so far as it was legally possible for him so to do. With promptness he prepared and filed with the referee his report and petition asking for a confirmation of the sale, which he approved as being for the best interests of the estate. The referee thereupon made an order fixing the day for the hearing, and gave notice of such hearing.

Necessarily expenses were incurred in taking these proceedings and time was lost. There was an acceptance and a partial performance on the part of the trustee; the estate parted with a consideration. Having induced the officers to refrain from looking elsewhere for a purchaser, and to incur expenditures in reliance upon his promises, Jackson cannot be heard to say there was no consideration. By his bid he in substance either expressly or by reasonable implication agreed to take the property described, provided the estate would give him good title within a reasonable length of time. No time was fixed for the consummation of the proceedings requisite to enable the trustee to convey title, but in the absence of an express agreement a reasonable time is to be implied. There is no pretension that the trustee or the referee was dilatory or that a reason-

able time had elapsed. If Samuel L. Boyd, the trustee here, had owned this property in his own right, and Jackson had concluded to purchase the same provided a good title could be given, and if it was brought to his attention that certain other persons were claiming title to the property, and if, under such conditions, [36] he had made an offer in substance like one of these bids, by which he agreed to take the property at a certain stipulated price upon condition that, and when, Boyd should secure a final decree in a court of competent jurisdiction quieting his title as against the claims of such third persons, and if, accompanying such offer, he had delivered to Boyd \$1,000 as evidence of his good faith, to be held and forfeited or refunded substantially upon the conditions named in one of these bids, and if thereupon Boyd had employed counsel and commenced a suit to quiet title, and had caused the process of the Court to be served upon the adverse claimants, would it be contended that after Boyd had incurred such expenses, Jackson could, the hour before a decree quieting title was to be entered, recede from his offer and demand a return of the forfeit money, leaving Boyd without any relief for the prejudice he had suffered by delay and for the expenses which he had incurred? In principle I am unable to distinguish the supposed case from the one under consideration. If such an offer was understood to be subject to withdrawal at the option of Jackson at any time before confirmation, the cash deposit was a mere sham and of no value whatever. By neither party have I been furnished with any citations di-

rectly in point. Upon behalf of the claimant authorities have been invoked which go to the extent only of holding that in ordinary dealings between private individuals an offer does not become a binding contract until the same has been accepted by the party to whom it is made, and accepted strictly in accordance with its terms. On behalf of the trustee the case of *In re Miller*, 171 Fed. 263, has been referred to as throwing some light upon the general principles involved. Perhaps more nearly in point are *Bloosom v. Milwaukee Railroad Co.*, 1 Wall. 656; 17 L. Ed. 673, and *Camden v. Mayhew & Co.*, 129 U. S. 73; 32 L. Ed. 608. It is thought that the principles upon which these cases were decided are in harmony with and support the conclusion here reached. Accordingly the referee's order complained of by the trustee will be reversed.

[Endorsed]: Filed Dec. 3, 1912. A. L. Richardson, Clerk. [37]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

449.

In the Matter of the LANE LUMBER COMPANY,
LIMITED, a Corporation,

Involuntary Bankrupt.

DUVAL JACKSON,

Petitioner,

vs.

SAMUEL L. BOYD, Trustee of the LANE LUM-
BER COMPANY, Limited, a Corporation,
Bankrupt.

Decree.

This cause 'being the Petition for Review by the Trustee of the Order made and entered herein by the Referee requiring the trustee to pay Duval Jackson Two Thousand (\$2,000.00) Dollars, paid on the purchase price of the assets of the bankrupt, came on to be heard at this term and was argued, E. N. La Veine appearing as counsel for the trustee, Samuel L. Boyd and Reed & Boughton appearing as counsel for the claimant, Duval Jackson; the Court having heard and considered the issues as joined by the pleadings herein, the allegations in the pleadings not denied being admitted, and having made and entered its Findings of Fact and Conclusions of Law; and thereupon consideration thereof, it was

ORDERED, ADJUDGED AND DECREED that the Order of the Referee made and entered herein on November 21st, 1912, from which order this review is taken by the trustee, in accordance with the memorandum decision herein, be and the same is hereby reversed, vacated and set aside, and costs taxed against said Duval Jackson.

Dated this 3d day of December, 1912.

(Signed) FRANK S. DIETRICH,
District Judge.

[Endorsed]: Filed Dec. 6, 1912. A. L. Richardson, Clerk. [38]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

UNITED STATES OF AMERICA.

District of Idaho,—ss.

I, A. L. Richardson, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing copies of petition for repayment of money, answer to petition of Duval Jackson for refund of \$2,000.00, order, findings of fact and conclusions of law, decree, and memorandum decision, in the Matter of Lane Lumber Company, Bankrupt, have been by me compared with the originals and that it is a correct transcript therefrom and of the whole of such originals as the same appears of record and on file at my office and in my custody.

In testimony whereof, I have set my hand and affixed the seal of said court in said district this 16th day of January, 1913.

[Seal]

A. L. RICHARDSON,

Clerk.

[Acceptance of Service of Petition, etc.]

Service of the foregoing petition is hereby accepted by receipt and retention of a true copy thereof this 21st day of January, 1913; and consent is hereby given to filing said petition without further notice on behalf of said petitioner, a copy of the printed record to be served on respondent when same is printed.

E. N. LA VEINE,

Attorney for Samuel Boyd, Trustee, Respondent.

[Endorsed]: No. 2243. United States Circuit Court of Appeals for the Ninth Circuit. Duval Jackson, Petitioner, vs. Samuel L. Boyd, as Trustee in Bankruptcy of The Lane Lumber Company, Limited, a Corporation, Bankrupt, Respondent. In the Matter of The Lane Lumber Company, Limited, a Corporation, Involuntary Bankrupt. Petition for Revision under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, the Decree of the United States District Court for the District of Idaho, Northern Division.

Filed January 25, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

DUVAL JACKSON,

Petitioner,

vs.

SAMUEL L. BOYD, as Trustee in Bankruptcy of THE
LANE LUMBER COMPANY, LIMITED, a Corporation, Bankrupt,

Respondent.

In the Matter of THE LANE LUMBER COMPANY,
LIMITED, a Corporation, Involuntary Bankrupt.

On Petition for Review from the United States District
Court for the District of Idaho,
Northern Division

Brief of Petitioner Duval Jackson on Review

FRANK W. REED,

EUGENE V. BOUGHTON,
Coeur d'Alene, Idaho.

CLAY H. ALEXANDER,
Kansas City, Missouri.

Attorneys for Petitioner.

*The United States Circuit Court of Appeals for
the Ninth Circuit*

THE UNITED STATES CIRCUIT COURT OF AP-
PEAL FOR THE NINTH CIRCUIT.

ARGUMENT AND AUTHORITIES.

DUVAL JACKSON,

Petitioner.

vs.

SAMUEL L. BOYD, as Trustee in Bankruptcy of the
LANE LUMBER COMPANY, LIMITED, a corpor-
ation, Bankrupt.

Respondent.

In the Matter of THE LANE LUMBER COMPANY,
LIMITED, a Corporation, Involuntary Bankrupt.

On Petition for Review from the United States District
Court for the District of Idaho, Northern
Division.

STATEMENT OF CASE.

The petition of Duval Jackson for Writ of Review
in this case shows the following facts:

That on the 24th day of June, 1912, petitioner Du-
val Jackson made a proposal to purchase the property
of the Lane Lumber Company, Bankrupt, for One Hun-
dred Forty Thousand (\$140,000) Dollars. This pro-
posal was in two bids, aggregating the amount above
specified, and on each one of the proposals or offers,
petitioner deposited with the Trustee his check for One
Thousand (\$1,000) Dollars as evidence of his good faith.

The Trustee did not at this time or at any time sub-

sequently accept the offer of Duval Jackson, but he did petition the court, praying that a sale for said amount be confirmed. This petition for confirmation was set down for hearing on the 15th day of July, 1912. On the 10th day of July, 1912, petitioner withdrew his offers to purchase, by sending a telegram to the Referee and also to the Trustee, and on the same day mailed two written withdrawals and demanded a return of the Two Thousand (\$2000) Dollars which he had deposited with the Trustee. The telegrams and letters of withdrawals were received by the Court and the trustee prior to the meeting of July 15th. Notwithstanding the withdrawals of the two offers to purchase, the Court on said day took up the question of confirmation of the sale to petitioner on his original offers, and as shown by the order made and entered by the Referee (Record, pages 30-32, inclusive), the proposals were not accepted and confirmed by the Court, but certain property, to-wit, all of the lumber, lath, and 300,000 feet of cedar logs, were excepted, and the sale confirmed as to the balance.

As the Trustee refused to return the Two Thousand (\$2,000) Dollars which petitioner had deposited with him at the time these offers were made, a petition was filed on the 8th day of October, praying the Court to direct the Trustee to refund the Two Thousand (\$2,000) Dollars so deposited, to said petitioner. This petition was brought on for hearing on the answer of the Trustee admitting the facts set forth in the petition, and on the 11th day of November, 1912, the Court made an or-

der requiring the Trustee to refund said Two Thousand (\$2,000) Dollars to said petitioner. From this order and ruling of the Referee, the Trustee took a review to the District Court, claiming that the Referee was in error in making said order, on three grounds:

1. In holding that Duval Jackson had the legal right to withdraw his bids and each of them, prior to the acceptance by the Court, is contrary to the terms of the written bid made by Duval Jackson and is against the law.

2. There is no showing or contention that the Trustee did not comply with the terms and conditions of said contract, required of him to be performed, therefore said order is against the law.

3. The amount of money deposited with the bids was required to compel the purchaser to show his good faith, which is conceded by the terms of the bid; that the petitioner after putting the machinery of this court in operation for the purpose of having said sale confirmed, showed his bad faith by withdrawing his bid on the day of hearing just before the hour set for the hearing, therefore said order is against the law.

This review came on for hearing before the Honorable F. S. Dietrich, District Judge on the 3rd day of December, 1912. A decree was entered reversing the order of the referee in Bankruptcy and holding that the Trustee was entitled to retain the Two Thousand (\$2,000) Dollars paid to him by petitioner, Duval Jackson, at the time of the offer to purchase the property in

question. From this decree appellant has taken a review to this court.

ASSIGNMENTS OF ERROR.

Petitioner assigns error as follows:

I.

The court erred in making and filing his conclusions of law that the referee's order complained of by the Trustee should be reversed, vacated and set aside and costs taxed against said Duval Jackson.

II.

The Court erred in decreeing that petitioner Duval Jackson is not entitled to a return of the \$2,000.00 paid to the Trustee as an evidence of his good faith in making his written offers to purchase the property of the Lane Lumber Company, Limited, a bankrupt.

III.

The Court erred in making and filing his decree reversing, vacating and setting aside the order of the referee in said matter and in taxing costs against said petitioner Duval Jackson.

IV.

The Court erred in making and filing his decree in said matter and in denying petitioner the relief asked in his petition.

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ARGUMENT AND AUTHORITY.

As the facts are admitted in this case, the only question to be decided is the one of law; and that is as to whether or not Duval Jackson had the legal right to

withdraw his bids for said property at any time before the acceptance thereof, and whether the referee in bankruptcy by excepting a part of the property which petitioner offered to purchase from the order confirming the sale did not, in effect, constitute a new offer which petitioner would have to accept before he would be legally bound to take the property.

The proposals, or offers to purchase, of Duval Jackson were merely an offer to contract in the future. There was no consideration whatever for the payment of the Two Thousand Dollars, as no contract was entered into between the parties. In fact, the proposal specifically provides that, if, when a contract has been consummated by the acceptance of the offer made, petitioner fails to carry out his part of the contract, he is not to be liable for more than Two Thousand Dollars, by reason of failure to perform the contract. Now clearly this amount could not be retained as liquidated damages for breach of contract, but until there was a contract between the parties there would be no liability on the part of Duval Jackson to forfeit the amount of money which he had paid to the Trustee.

It is a rule of law laid down by all authorities, so far as we are able to find, that an offer may be withdrawn at any time before acceptance.

9 Cyc 284-5-6-7.

Martin v. Hudson, 22 Pac. 292 (Calif.).

Sherwin v. National Cash Register Co. 38 Pac. 392 (Colo.).

ber. The petition thus clearly shows that the offer of your petitioner was never accepted by the Trustee or the Court, and that the attempt to confirm the same by excepting certain of the property mentioned, amounted in effect only to a new proposition or offer on the part of the Trustee and Court, which would necessarily have to be accepted by your petitioner before it would become a binding contract.

If, conceding that your petitioner had no legal right to withdraw his offer to purchase prior to the time set for confirmation, which would entitle him to a refund of the money deposited, the attempted confirmation of sale certainly would not bind your petitioner to accept the property under the new proposal or offer made by the court.

It is a fundamental principle of law that an offer must be accepted as made, and any variation in the acceptance from the offer made, either as to time, place, quantity or other matters, is not deemed in law a sufficient acceptance of the offer to make a binding contract.

9th Cyc. pg. 265.

“An acceptance, to be effectual, must be identical with the offer, and unconditional. Where a person offers to do a definite thing, and another accepts conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat, or it is a counter-proposition, and in neither case is there an agreement. This is true, for example, where an acceptance varies from

the offer as to the time of performance, place of performance, price, quantity, quality, etc.”

9th Cyc. pg. 267, 268.

This principle of the law is so clear and undisputed that we do not deem it necessary to cite further authorities. Petitioner contends, therefore, that as the offer made had never been accepted up to the time of withdrawal, that he had a perfect right to withdraw the offer and have the money returned to him which he had deposited with the Trustee. Suppose, for instance, that petitioner, instead of depositing \$2,000.00 on his offer had specified in his written offer that as an evidence of good faith, he was depositing the entire purchase price. Would any one contend for a minute that where the offer was withdrawn prior to the acceptance, that the entire purchase price could be restrained?

The cases of *Blossom v. Milwaukee R. R. Co.*, 1 Wallace 656; 17 Law Ed. 673; *Camden v. Mayhew & Co.*, 129 U. S., 73, 32 Law Ed. 608 cited by the Honorable District Judge do not appear to us to be in point.

The case of *Camden v. Mayhew & Co.*, 129 U. S., 73, 32 Law Ed. 608 was an action requiring appellants to pay the difference between the amount bid by him for certain real estate offered for sale at public auction under a decree in the same suit, and the amount the same property brought on a resale had because of his refusal to comply with the terms of the bid.

It will be seen that this case is not in point, for the reason that in that case, property was offered for sale at

public auction, and appellant bid \$173,050 and the property was knocked down to him at that price; and a report made by the commissioners to the court of said sale at the place mentioned. However, appellant would not pay the amount nor any part thereof, so that subsequently it became necessary to resell the property and at the second sale the property only brought \$119,100.

It is a rule of law that in auction sales the party bidding is always liable for the amount of his bid where the property is knocked down to him, and if he fails to complete the purchase for the price bid, he is liable for the difference between the price the property brings at a subsequent sale and the amount bid; but in the case at bar there never was any acceptance of the offer made, in fact, the sale was not a sale at public auction, the court had authorized the Trustee to sell at private sale, and he had secured a party who made an offer, and this offer was put up to the court to accept or reject as he should see fit.

The case of *Blossom v. Milwaukee R. R. Co.*, 1 Wallace 656; 17 Law Ed. 673, is also a case of sale at public auction and the rule would be different than in cases of private sale.

In the case of *Tillman v. Dunman, Executor*, 114 Ga. 406; 57 L. R. A. 784, in an exhaustive note thereto, it is held that a judicial officer has the right at any time to withdraw an offer to sell property after a bid has been made and before acceptance or confirmation by the

Court. This rule should apply with equal force to the party making the offer.

In re: American Copper Co., 183 Fed. 556.

It must be conceded that the offer of Duval Jackson was not accepted by the Trustee, for if he had received a better offer any time after the making of the offer by petitioner in this case it would have been his duty, and he could legally have disregarded the offer of the petitioner and returned the \$2,000.00 to him which he had paid, and there would have been no way of enforcing a specific performance of the contract.

The offer to purchase clearly shows that the money was not deposited to be held as stipulated damages in case of failure to complete the contract prior to its acceptance; but it does show clearly, that if, after the sale was confirmed, and a binding contract was made between the parties, petitioner failed to complete the contract, then he was not to be liable for any further damages by reason of such failure.

As to the question that the trustee is entitled to retain the Two Thousand Dollars because of the bad faith of petitioner in withdrawing his bids, we have been unable to find a single case, and we do not think that the Trustee can find one, sustaining his position. While it is true that the \$2,000.00 was deposited as an evidence of his good faith, petitioner still had the right to withdraw his bids and it would be incumbent upon the Trustee to prove that the bids were made with some ulterior motive or purpose in view by which he expected

to benefit by the transaction, before there could be any question as to the Trustee's right to retain the \$2,000.00 Dollars. It is not claimed by the Trustee that there was any such purpose in withdrawing the bids, and petitioner had the right to withdraw them at any time before they were accepted.

Under the decisions above cited, we are satisfied that petitioner is entitled to the \$2,000.00 paid the Trustee at the time he made the offer for the purchase of the property of the Lane Lumber Company, and as this offer was not accepted by the Trustee, nor confirmed by the Court, prior to the withdrawal, petitioner is entitled to his money.

Petitioner is entitled to recover the \$2,000.00 from the Trustee, even if it should be decided that he had no legal right to withdraw the offer before the time set for confirmation, because the action of the referee in excepting a part of the property from the offer to purchase shows clearly and conclusively that the Court made a new offer and as petitioner never accepted the same, no contract was in fact made between the parties.

We respectfully submit that the decree of the Honorable District Judge was erroneous, and should be reversed, and a decree entered, requiring the Trustee to

refund to your petitioner Duval Jackson, the sum of Two Thousand (\$2,000) Dollars with interest.

Respectfully submitted,

FRANK W. REED,

EUGENE V. BOUGHTON,

Attorneys for Petitioner,

Coeur d'Alene, Idaho.

CLAY H. ALEXANDER,

Attorney for Petitioner,

Kansas City, Missouri.

Service of the within Brief of Petitioner Duval Jackson, on Review, is hereby accepted, by the receipt of a copy thereof, this.....day of April, A. D. 1913.

.....

Attorney for Trustee,

Coeur d'Alene, Idaho.

United States
Circuit Court of Appeals

For the Ninth Circuit

DUVAL JACKSON,

Petitioner.

vs.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
a Corporation, Bankrupt.

Respondent.

In the Matter of THE LANE LUMBER COMPANY,
LIMITED, a Corporation, Involuntary
Bankrupt.

On Petition for Review From the United States District
Court for the District of Idaho,
Northern Division.

*Brief of Respondent, Samuel L. Boyd, Trustee
on Review*

E. N. LA VEINE,
Coeur d'Alene, Idaho.
Attorney for Respondent.

THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

DUVAL JACKSON,

Petitioner.

vs.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
ED, a Corporation, Bankrupt.

Respondent.

In the Matter of THE LANE LUMBER COM-
PANY, LIMITED, a Corporation, Involuntary
Bankrupt.

On Petition for Review From the United States Dis-
trict Court for the District of Idaho,
Northern Division.

STATEMENT OF THE CASE.

Samuel L. Boyd, trustee herein, on February 6th, 1912, filed a duly verified petition praying for an order permitting him to sell at private sale, free and clear of all liens and encumbrances, the real and personal property of the bankrupt; on February 7th, 1912, the Referee herein caused due and legal notice to be given to all of the creditors and lien claimants of the bankrupt setting the hearing on said petition for February 20th, 1912; on February 20th, 1912, upon application of some of the creditors of the bankrupt said hearing was continued to February 24th, 1912; on February 24th, 1912, the hearing was had on said petition by virtue of said notice;

That on March 2d, 1912, an order was made and entered herein approving and authorizing the private sale, either as a whole or in parcels, free and

clear of all liens and encumbrances, of all of the real and personal property of the bankrupt, by the trustee, subject to the approval of the Court, after due notice to all creditors; (Transcript pp. 30 and 31.)

On June 24th, the trustee received from the petitioner, Duval Jackson, two bids, called proposals, for the purchase of all of the real and personal property of the bankrupt for the consideration of One Hundred Forty Thousand Dollars (\$140,000), with a deposit of Two Thousand Dollars (\$2000) in cash, earnest money, as evidence of his good faith; (Transcript pp. 7 to 21).

On June 27th, 1912, the trustee, having accepted said amount offered, filed a petition for the confirmation of the sale made by him; (Transcript pp. 21 to 25).

On July 1st, 1912, in accordance with the prayer of your said trustee's petition, the Referee herein gave notice to all creditors of the bankrupt of said sale, which was made returnable on July 15th, 1912, at 11 o'clock, a. m.; (Transcript pp. 25 to 27.)

There is no dispute as to the facts set forth in Duval Jackson's petition, (Transcript pp. 4 to 7), and your trustee's answer thereto; (Transcript pp. 36 to 39.)

It is conceded that Duval Jackson well knew that on August 1st, 1912, there would be due and payable to the Northern Trust Company of Chicago, Illinois, the sum of Twelve Thousand Five Hundred Dollars (\$12,500), and interest, on the bonded in-

debtedness of the bankrupt and he further knew that the trustee had no money on hand with which to pay said indebtedness and that the trustee was relying upon the fulfillment of his purchase in order to raise said sum for said purpose; that the trustee did everything on his part to be done as required by said proposals to purchase; that nothing was done by the trustee to affect the title of the property covered by petitioner's bid until after the petitioner withdrew his bid; that the reason the trustee demanded and received Two Thousand Dollars (\$2000) earnest money from said Duval Jackson was to assure this estate of the good faith of said Duval Jackson; that it was agreed between the trustee and said Duval Jackson if said sale was not consummated on account of any fault on the part of Duval Jackson that he should forfeit the said Two Thousand Dollars (\$2000), which agreement was set forth in writing and is a part of the bids. (Transcript pp. 37 and 38.)

It is not contended that the trustee did not do everything on his part to be done under said proposals and bids:

Notwithstanding the good faith on the part of the trustee, ten days after notice had been given to the creditors of the bankrupt, and all the machinery of the bankruptcy court had been set in operation in order to confirm said sale, the trustee received the telegram marked Exhibit "E," (Transcript p. 26).; the Referee also received about the same time a telegram marked Exhibit "F," (Transcript p. 27.)

On the morning of July 15th, 1912, before 11 o'clock, the hour set for the confirmation of said sale, the petitioner caused the written withdrawals to be filed marked Exhibits "G" and "H," (Transcript pp. 27 to 31.); the trustee feeling that the petitioner was going to go back on his contract, and knowing that if he did, that on August 1st, 1912, there would be due and payable on the bonded indebtedness of the bankrupt, Twelve Thousand Five Hundred Dollars (\$12,500), and interest, which sum he did not have on hand to meet said indebtedness, he made a strenuous effort to obtain a purchaser for a sufficient amount of the assets of the bankrupt to take care of said installment in the event the petitioner failed to consummate his deal, and pay the installment due thereunder, in order to avoid litigation and additional expense to the estate;

The trustee procured a purchaser for the lumber, lath and molding owned by the bankrupt, who bid Twenty-one Thousand Dollars (\$21,000), and filed a petition for the confirmation of the sale on July 12th, 1912, and had the hearing thereon set for July 26th, 1912, eleven days after the date set for the Duval Jackson confirmation; (Transcript pp. 32 to 36).

The trustee also procured a purchaser for 300,000 feet of cedar logs at \$7.00 per M., and filed a petition for the confirmation of the sale on July 15th, 1912, and had the hearing thereon set for July 26th, 1912; (Transcript pp. 30 to 33.)

Observe that the day set for these confirmations was eleven days after the date set for the confirmation of the Duval Jackson bids;

On July 15th, 1912, pages 1188 to 1190 of the record show what transpired, the creditors offered no objection to the confirmation of the sale to Duval Jackson for One Hundred Forty Thousand Dollars (\$140,000), as per his bid; the trustee instead of assuming the burden of showing his right to said Two Thousand Dollars (\$2000), retained said sum and shifted the burden to Duval Jackson, consequently this proceedings commenced before the Referee who held adverse to the trustee, on review the Referee was reversed by the District Judge and the trustee's position sustained, from which latter ruling the petitioner, Duval Jackson, takes this review:

On July 15th, 1912, the order confirming the private sale of the real and personal property of the bankrupt to Duval Jackson, excepting the lumber, lath and molding, and 300,000 feet of cedar logs, above referred to, was made and entered; (Transcript pp. 30 to 33).

The proceeding was so conducted to show the bona fides of the trustee and to enable Duval Jackson to complete the purchase of the remaining assets of the bankrupt and thereby not lose the Two Thousand Dollars (\$2000) earnest money deposited.

No objections were made by Duval Jackson to the manner in which the court handled the transaction;

Duval Jackson, after he returned to Kansas City, his home, decided that he could not see the purchase through and pay the amount bid, hence his demand as per his petition filed herein on October 7th, 1912; (Transcript pp. 4 to 8.)

Now referring to Duval Jackson's "PROPOSAL TO PURCHASE PROPERTY," marked Exhibit "A" of his petition. (Transcript pp. 7 to 15.)

On page 12, twelfth line, we find: "I DEPOSIT WITH YOU AT THIS TIME THE SUM OF ONE THOUSAND DOLLARS (\$1000) AS EVIDENCE OF MY GOOD FAITH, ETC."

On page 14 fourth line, we find: "SHOULD THIS PROPOSAL TO PURCHASE BE ACCEPTED BY AND APPROVED BY THE COURT, IT IS WITH THE DISTINCT AND EXPRESS UNDERSTANDING OF ALL PARTIES CONCERNED THAT THE DAMAGE FOR FAILURE ON MY PART TO COMPLETE THE FULFILLMENT OF ANY PART OF THIS PROPOSAL IS TO BE LIMITED TO SUCH PAYMENTS AS HAVE BEEN MADE."

Now referring to Duval Jackson's "PROPOSAL TO PURCHASE PROPERTY" marked Exhibit "B" of his petition. (Transcript pp. 14 to 21.)

On page 18, seventh line from the bottom, we find: "AS AN EVIDENCE OF MY GOOD FAITH IN MAKING THIS BID, I HAND YOU HEREWITH THE SUM OF ONE THOUSAND DOLLARS (\$1000), etc."

On page 20, eleventh line, we find: "SHOULD THIS PROPOSAL TO PURCHASE BE ACCEPTED BY YOU AND APPROVED BY THE COURT, IT IS WITH THE DISTINCT AND EXPRESS UNDERSTANDING OF ALL PARTIES CONCERNED THAT THE DAMAGE FOR FAILURE ON MY PART TO COMPLETE THE FULFILLMENT OF ANY PART OF THIS PROPOSAL IS TO BE LIMITED TO SUCH PAYMENTS AS HAVE BEEN MADE."

Now on July 15th, 1912, at 11 o'clock a. m., the court and creditors were ready and willing to confirm said sale of Duval Jackson and so indicated to the court, see record above referred to.

Duval Jackson deposited with the trustee the Two Thousand Dollars (\$2000) sought to be recovered, in order to show his "GOOD FAITH" as expressed in his bids.

ARGUMENT.

It is necessary to except to certain portions of the petitioner's Statement of Case for the reasons that they are not borne out by the record:

First. On page 2 of petitioner's brief we find the following: "The trustee did not at this time or any time subsequently accept the offer of Duval Jackson, but he did petition the court, praying that a sale for said amount be confirmed."

In the trustee's PETITION FOR CONFIRMATION OF SALE OF BANKRUPT'S REAL AND PERSONAL PROPERTY, on page 20 of the

transcript, we find the following recitation which is not disputed:

“That on February 6th, 1912, your petitioner filed a petition for the sale of the real and personal property herein; that thereafter, after due notice to all creditors, this court on March 2d, 1912, made and filed an order “Approving and Authorizing Private Sale of the Real and Personal Property by the Trustee, Subject to the Approval of the Court, After Due Notice to all Creditors;”

It cannot be disputed that he had authority to sell. After he had sold the property to Duval Jackson, he submitted the sale to the court for confirmation. On page 23 of the transcript, in the same petition, the trustee says to the court:

“That in order to deliver said property to the pruchaser it is necessary for your petitioner to have given ten days’ notice, as required in the order of sale herein, given to all the creditors, so that the creditors herein may determine whether or not they desire for said sale to be confirmed by this Court.”

On the same page, the next two paragraphs, the trustee pleads with the court to confirm the sale in the following language:

“Your petitioner is of the opinion and verily believes that a larger sum than is above bid cannot be obtained, and advises that the said real and personal property be sold and delivered to

the bidder, for the reason that said sawmill, planing mill and personal property have been and are rapidly deteriorating in value; that the estate has been and is now to considerable expense in keeping said property insured from fire, paying the taxes thereon, and in keeping watchmen to protect the same; that this estate cannot be kept intact any longer without great expense and risk from fire; all of which expense will continue unless said sale is confirmed and the property converted into money."

"That in the opinion of your petitioner, said estate is unlikely to produce better results and he verily believes that each of the proposals to purchase should be accepted and the sale confirmed."

Second. On page 3, of Petitioner's Brief, four lines from bottom, we find the following: "This petition was brought on for hearing on the answer of the trustee admitting the facts set forth in the petition, etc." Petitioner overlooked the fact that the Findings of Fact recite: "from the facts presented by the pleadings, all allegations therein not denied being admitted by the parties." See paragraphs 2 and 6, (Transcript pp. 36 to 39), of respondent's answer which sets up new facts as follows:

2.

"Admits paragraph two, but alleges that the reason and only reason your trustee and this court did not confirm the bids made by the pe-

tioner in full was on account of his withdrawal before the time set for confirmation, that the proposals to purchase submitted by petitioner provided:

‘Should this proposal to purchase be accepted by you and approved by the Court, it is with the distinct and express understanding of all parties concerned that the damage for failure on my part to complete the fulfillment of any part of this proposal, is to be limited to such amounts as have been made.’

6.

“Admits paragraph six, but alleges that the reason therefor is set forth in the petition for confirmation of the sale of the lumber belonging to the bankrupt filed herein on July 12th, 1912, and as set forth in the petition for confirmation of the sale of 300,000 feet of cedar logs, at \$7.50 per M., belonging to the bankrupt, filed herein on July 30, 1912.

“Further answering said petition your trustee alleges that said Duval Jackson well knew that on August 1st, 1912, there would be due and payable to the Northern Trust Company of Chicago, Illinois, the sum of Twelve Thousand Five Hundred (\$12,500) Dollars and interest, on the bonded indebtedness of the bankrupt, and he further knew that your trustee had no money on hand with which to pay said indebtedness and that your trustee was relying upon the ful-

fillment of his purchase in order to raise said sum for said purpose; that your petitioner did everything on his part to be done as required by said proposals to purchase; that nothing was done by your trustee to affect the title of the property covered by petitioner's bid until after the petitioner attempted to withdraw his bid; that the reason your petitioner demanded and received Two Thousand Dollars (\$2000) earnest money from said Duval Jackson, was to assure the estate of the good faith of said Duval Jackson; that it was agreed between your trustee and said Duval Jackson if said sale was not consummated on account of any fault on the part of Duval Jackson, that he should forfeit the said Two Thousand Dollars (\$2000), which agreement was set forth in writing and is a part of the bids."

These admissions referred to in the findings, were made in open court by Messrs. Reed & Boughton, for the petitioner, and Mr. La Veine, for the trustee.

This fact should be borne in mind throughout the discussion: It is undenied, either in the pleadings or the brief that the trustee, as trustee, did and performed everything that was required of him under the contracts, called "proposals." That on July 10th, 1912, five days before the day set for confirmation, after notice to creditors had been given of the proposed confirmation, Duval Jackson gave notice

of forfeiture of his contract by withdrawing the bids, without any reason therefor, (Transcript pp. 26 and 27.) Petitioner's Brief, page 3, lines 4 to 12.

Who was guilty of the first breach of the contract between the trustee and Duval Jackson? Duval Jackson.

This court should refuse to permit the first person guilty of a breach to compel the trustee to refund the Two Thousand Dollars (\$2000).

The records of the court will bear me out in the following statement. The assets of the bankrupt for which Duval Jackson bid \$69,519.40, have been sold at forced sales to meet the bonded indebtedness and costs of administration for the following sums:

Lumber, etc., referred to in Order Confirming sale to Duval Jackson	\$21,000.00
Logs, to Harrison Shingle Co.	1,177.47
Logs, to McGoldrick Lbr. Co.	4,091.43
Railroad and Equipment	3,700.00
Remainder, except assets referred to in Exhibit "B"	22,000.00

Total \$51,968.90

Deducting \$51,968.90 from \$69,519.40, bid by Duval Jackson, makes a total loss, to the estate of \$17,550.50. This is an enormous sum for the estate to lose and had not Duval Jackson protected himself with the following clauses in his proposals the trustee would now be suing him for the \$17,550.50:

"Should this proposal to purchase be accep-

ted by and approved by the Court, it is with the distinct and express understanding of all parties concerned that the damage for failure on my part to complete the fulfillment of any part of this proposal is to be limited to such payments as have been made." (Transcript, p. 14, Exhibit "A," lines 4 to 9 inc.)

"Should this proposal to purchase be accepted by you and approved by the court, it is with the distinct and express understanding of all parties concerned that the damage for failure on my part to complete the fulfillment of any part of this proposal is to be limited to such payments as have been made." (Transcript, p. 20, Exhibit "B," lines 11 to 17 inc.)

With reference to the authorities cited by petitioner, in support of his contention, we will take each citation and point out its failure to apply to the facts presented in this action.

9 Cyc. 284-5-6-7 is cited.

This citation deals with *offer*. Jackson's offer was accepted by the trustee for the estate when he took the \$2000. He was agent of the court. The court and each and every creditors stood ready and willing to ratify his act on July 15th, 1912, in every detail, and the record bears out this statement. Jackson did not want the court to confirm the sale and placed the court in a most embarrassing position. Are courts going to permit this trifling?

The above citation in Cyc. shifts to *auc-*

tions. This was not a sale at auction. Not a verbal bid. It was a contract between Duval Jackson and the trustee. The trustee performed every covenant to be performed by him and so did the court, consistent with good business judgment. The hammer went down, to use the auctioneer's phrase, when the trustee accepted the \$2000. The trustee spoke first, ~~and~~ ^{and} when he filed his petition for confirmation, even under the auctioneer theory, Duval Jackson ~~is~~ ^{was} estopped from claiming the \$2000.

Duval Jackson promised to pay the money to the estate. It was his offer. On page 287, *supra*, we find: "The promisor is bound, but the promisee need not take advantage of the promise unless he chooses." The trustee chooses to hold the money for the breach.

Martin v. Hudson, 22 P. 292 (Cal.) cited by petitioner is not in point because:

1. No consideration whatever in said case ever passed from the plaintiff to the defendant.
2. It was a mere proposal or offer to sell.

In this case Duval Jackson paid \$2000 on the purchase price, it was a contract between him and the trustee which Duval Jackson prevented the court from confirming in toto. The court was ready and willing to confirm the sale on July 15th, 1912, the earliest possible time under the bankruptcy practice.

Sherwin v. National Cash Register Co. 38 P. 392 (Colo.)

This case is based on a written order signed by Sherwin for a cash register. No money was paid on

the purchase. He gave notice to the Cash Register Company of withdrawal before they accepted the order.

Page on Contracts, cited by petitioner, is not in point because, Page contemplates failure to accept. The offer was accepted by our trustee, there was a meeting of minds. The trustee is the court's right arm for converting estates into cash.

Scanlon v. Oliver, 44 N. W. 103 (Minn.) is not reported where cited and we have been unable to locate it.

9 Cyc. 265-7-8, cited by petitioner, are quite general and the law therein referred to does not contemplate that the first breach was made by the person seeking relief, as is the condition in this proceeding.

Counsel for petitioner asks the following question:

“Suppose, for instance, that the petitioner, instead of depositing \$2,000.00 on his offer had specified in his written offer that as an evidence of good faith, he was depositing the entire purchase price. Would any one contend for a minute that where the offer was withdrawn prior to the acceptance, that the entire purchase price could be restrained.” (Petitioner's Brief, p. 10, lines 10 to 16 inc.)

We certainly contend that had Duval Jackson paid the trustee the entire purchase price, under the facts in this case, he could not go back on his bargain and demand it simply because he had changed his

mind. If he could what would the words "sale" and "earnest money" mean?"

Trustees would never have any assurance that they could rely upon having funds with which to conduct the administration of bankrupt estates.

Blossom v. Milwaukee R. R. Co., 1 Wallace 656; 17 L. Ed. 673, we do not contend is in point.

Tillman v. Dunman, Executor 114 Ga. 406; 57 L. R. A. 784, was a sale at auction by an executor.

Camden v. Mayhew & Co., 129 U. S. 73, 32 L. Ed. 608, we do contend is in point and we will discuss it when we array our authorities.

In re American Copper Co., 183 F. 556, is not in point in any particular.

In paragraph 2 on page 12 of Petitioner's Brief, a statement of law is laid down which is altogether too broad when applied to bankruptcy sales. See *Sturgis v. Corbin* 141 F. 1, 72 C. C. A. 179, 15 Am. B. R. 543.

"The failure of one party to perform will discharge the other, and so that one cannot maintain an action against the other without showing performance on his part."

9 Cyc. 643, 644, note No. 60 on page 644.

Prior to the enactment of the Bankruptcy Act of 1898, the Supreme Court of the United States in *Camden v. Mayhew, et al*, in 1889, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. Ed. 608, held:

"Where a purchaser refuses, without cause, to make his bid good, he may be compelled to do so

by rule or attachment issuing out of the court under whose decree the sale is had; it is not necessary that his liability for a deficiency or a resale should be ascertained and enforced by an independent suit."

In 1906, in the case of *Mason v. Wolkowick*, 150 F. 699, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765, this court held: "The trustees petition must be held to have been an affirmance by him,, so far as in his power, etc."

In *supra*, subdivision 2 of syllabus we find: "Aside from the power of the federal District Court in regard to the assets of bankrupts, which is especially given it by statute, it has all the authority which any court exercising equitable jurisdiction has to protect its receivers and enforce contracts made by them." Also, subdivision 3 of syllabus:

"Whenever a receiver of a bankrupt, by direction of the court appointing him, makes a sale of assets in his possession, the parties concerned are bound to recognize him as an officer of the court, and hence such court, not only has power to enforce in a summary manner the completion of the contract of sale, but the parties involved are deemed to have consented to such proceedings."

The above rules would apply equally to trustees.

In 1911, this court had occasion to pass upon the question involved in this proceeding, *In re Jungmann, Inc.* 186 F. 302 (C. C. A.) and cited the above referred to cases of *Camden v. Mayhew* (U. S.) and *Mason v. Wolkowick* (C. C. A.)

Under the rule in the last mentioned case it appears conclusive to us that Duval Jackson by voluntarily becoming a purchaser of the Lane Lumber Company property, sold by the trustee at private sale under order of the court, that he submitted himself to the jurisdiction of the court, and when he refused, *without cause*, to carry out his contract he either forfeited his earnest money or laid himself liable to be compelled to perform the contract.

“An order made by a court of bankruptcy, authorizing a receiver to sell property of the estate at private sale in accordance with an offer made therefor by an outside party, whose counsel was present and assented, rendered the transaction a judicial sale as binding on the purchaser as though his offer had been made and accepted and the sale approved by the court after authority to sell had been given, and, if he refuses *without cause*, to carry out his contract, he may be compelled to do so by rule or attachment issuing out of the court under whose order the sale was made.”

In re J. Jungmann, Inc., 186 F. 302 (C. C. A.)

It seems quite apparent that as soon as the trustee accepted the \$2000 earnest money from Duval Jackson and filed his petition for confirmation of the sale, that thereupon Duval Jackson became bound:

First. Because the offer to purchase was accepted by the trustee.

Second. Because there was no breach by the trustee.

Third. Because on the return day the court and creditors were ready to confirm the sale in toto had Duval Jackson not made the withdrawals which forced the trustee to start the machinery of the bankruptcy court to sell portions of the estate to meet the installment of \$12,500 and interest on the bonded indebtedness due the Northern Trust Company of Chicago, Illinois, on August 1, 1912, referred to in trustee's answer, of which Duval Jackson had notice.

Fourth. Because he has forced this estate to sacrifice \$17,550.50.

Fifth. The withdrawals by Duval Jackson showed bad faith on his part.

Sixth. Because it would be a dangerous precedent to set and it would make the administration of estates more and more difficult.

We respectfully submit that the Decree of the Honorable District Judge should be affirmed in its entirety.

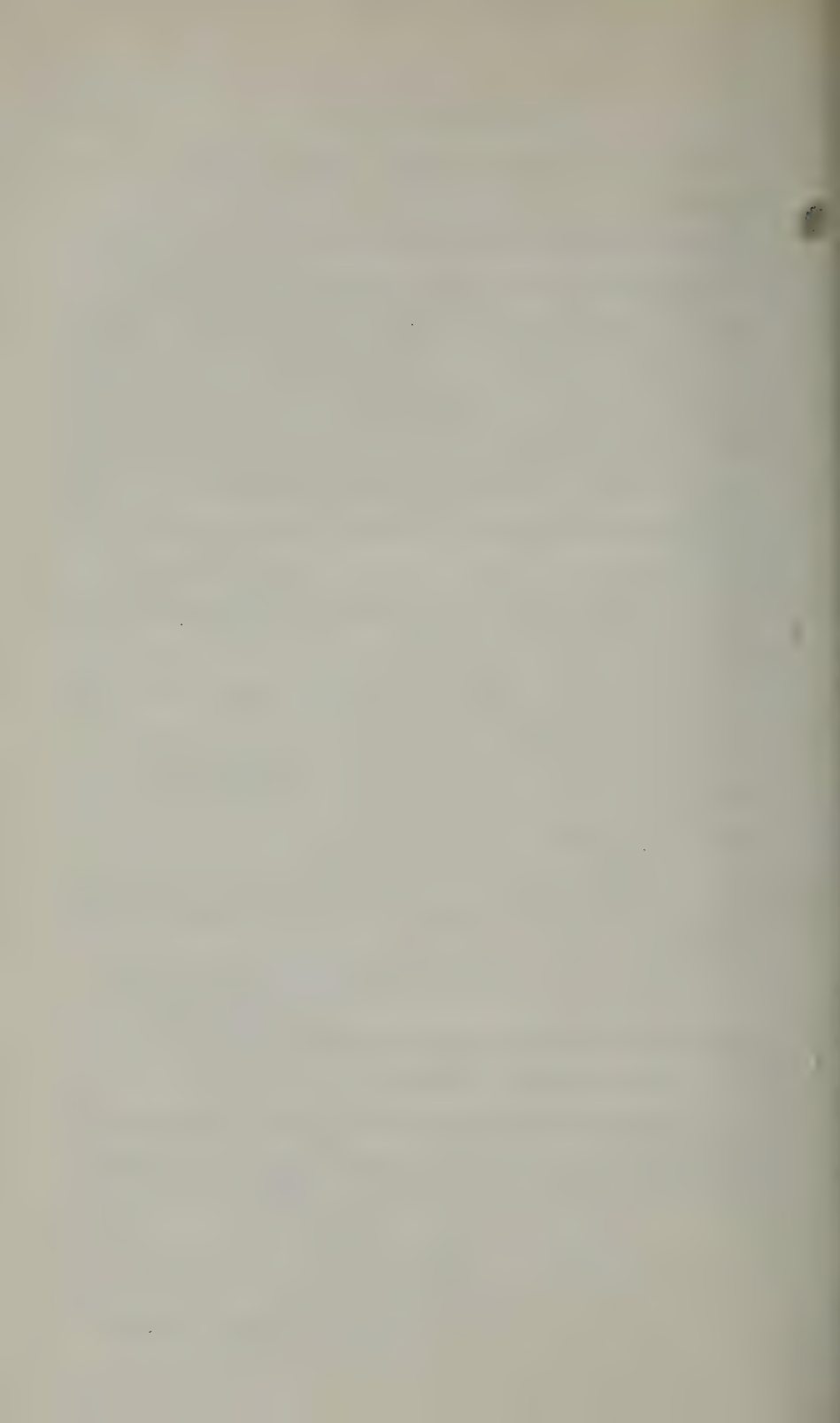
Respectfully submitted,,

E. N. LA VEINE,

Attorney for Respondent, Samuel L. Boyd, Trustee,
Coeur d'Alene, Idaho.

Service of the foregoing brief of Samuel L. Boyd, Trustee, is hereby accepted by receipt of copies thereof, this 3rd day of May, 1913.

Attorneys for Petitioners.



IN THE
United States Circuit Court
of Appeals

NINTH CIRCUIT

No. 2243.

DUVAL JACKSON,

Petitioner,

vs.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMIT-
ED, a Corporation, Bankrupt,

Respondent.

In the Matter of **THE LANE LUMBER COM-**
PANY, LIMITED, a Corporation, Involuntary
Bankrupt.

On Petition for Review from the United States Dis-
trict Court for the District of Idaho,
Northern Division.

REPLY BRIEF OF PETITIONER DUVAL
JACKSON ON REVIEW.

FRANK W. REED,
EUGENE V. BOUGHTON,
Coeur d'Alene, Idaho.
CLAY H. ALEXANDER,
Kansas City, Missouri.
Attorneys for Petitioner.

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Northern Division.

ARGUMENT.

In replying to the arguments and authorities put forth by the respondent, both in his brief and oral argument, a few facts as shown by the record would seem to conclusively settle the controversy.

The two written proposals made by the petitioner, Duval Jackson, to Samuel L. Boyd, trustee,

of the Lane Lumber Company, Limited, bankrupt, to purchase the remaining assets of said bankrupt company, were substantially alike (R. pp. 8 to 20).

The first proposal was for the mill, machinery and other personal property and certain real estate therein described situated in Kootenai County, Idaho.

The second proposal was for timber lands only (See R. pp. 15, 16, 17 and 18).

Each proposal was headed:

“PROPOSAL TO PURCHASE CERTAIN
PROPERTY”

and was addressed “To Samuel L. Boyd, Trustee in Bankruptcy of Lane Lumber Company, Limited.” After the address the proposals read as follows:

“THE UNDERSIGNED PROPOSES TO PURCHASE OF YOU, SUBJECT TO THE CONFIRMATION AND APPROVAL OF THE ABOVE-ENTITLED COURT, ALL OF THE PROPERTY AND ASSETS OF THE LANE LUMBER COMPANY OF WHATSOEVER KIND, CHARACTER, OR DESCRIPTION, **excepting only its timber lands and including all the property, save only said timber lands scheduled in the schedule and inventory annexed to your petition to sell real and personal property filed in the above-entitled court on the . . . day of February, 1912, which said petition, with schedule and inventory attached, is now on file in said court and reference to which is hereby made; excepting only from said schedule and inventory the timber lands**

above referred to and certain assets which have been sold, or otherwise disposed of by you, report of which are likewise now on file in the above-entitled cause.

THIS PROPOSAL INCLUDES ALL OF THE LUMBER OF SAID COMPANY SCHEDULED IN SAID SCHEDULE AS 3,186,631 FEET IN QUANTITY, ALL OF THE MOLDINGS SCHEDULED IN SAID SCHEDULE AND INVENTORY AS AMOUNTING TO 58,524 LINEAL FEET IN QUANTITY, ALL OF THE LATH IN SAID SCHEDULE SCHEDULED AS AMOUNTING TO 334,600 PIECES, ALL OF THE LOGS OF THE COMPANY SCHEDULED IN SAID SCHEDULE AS AMOUNTING TO 17,715 MIXED LOGS IN QUANTITY; all of the stable supplies, wagons, boat-houses, boat docks, rowboats, livestock, office furniture and fixtures, tools, mill supplies, realty and equipment, cooking utensils, furniture, tools, tug-boat, barge, boom-stock and boom-chains.

ALSO INCLUDING THE FOLLOWING REAL ESTATE AND PROPERTY SITUATED IN KOOTENAI COUNTY, IDAHO: (Here follows a description of the lands) (R. pp. 8-9).

Further down in said proposition the following statement is made:

"FOR THIS PROPERTY THE UNDERSIGNED OFFERS YOU THE SUM OF \$69,519.40, OF WHICH SUM I DEPOSIT WITH YOU AT THIS TIME THE SUM OF \$1,000.00 AS EVIDENCE OF MY GOOD FAITH, TO BE RETURNED TO THE UNDERSIGNED IN CASE YOU FAIL TO

SECURE THE ACCEPTANCE AND CONFIRMATION BY THE COURT TO THIS PROPOSAL. THE FURTHER SUM OF \$39,000.00 IS TO BE PAID BY THE UNDERSIGNED ON JULY 24, 1912, AND THE FURTHER SUM OF \$29,519.40 IS TO BE PAID SEPTEMBER 24, 1912, AT WHICH TIME YOU ARE TO CONVEY TO ME ALL OF THE PROPERTY AFORESAID BY GOOD AND SUFFICIENT DEEDS AND INSTRUMENTS OF CONVEYANCE, AND DELIVER ACTUAL POSSESSION THEREOF TO THE UNDERSIGNED" (R. p. 12).

And at the end of the proposal the following appears:

"SHOULD THIS PROPOSAL TO PURCHASE BE ACCEPTED BY AND APPROVED BY THE COURT, IT IS WITH THE DISTINCT AND EXPRESS UNDERSTANDING OF ALL PARTIES CONCERNED THAT THE DAMAGE FOR FAILURE ON MY PART TO COMPLETE THE FULFILLMENT OF ANY PART OF THIS PROPOSAL IS TO BE LIMITED TO SUCH PAYMENTS AS HAVE BEEN MADE" (R. p. 14, beginning 4th line).

Three days after the proposals were made, the trustee filed his petition before Lawrence L. Lewis, referee, in bankruptcy, and stated, after setting forth certain facts, the following:

"THAT YOUR PETITIONER HAS RECEIVED TWO BIDS ON AND FOR THE RESIDUE AND REMAINDER OF SAID

ESTATE BY DUVAL JACKSON, OF KANSAS CITY, MISSOURI, BIDDING THEREFOR THE SUM OF ONE HUNDRED FORTY THOUSAND (\$140,000.00) DOLLARS, WHICH IS MORE THAN 75% OF THE APPRAISED VALUE OF SAID PROPERTY, AS DISCLOSED BY THE APPRAISERS' REPORT ON FILE; THAT SAID ORIGINAL PROPOSALS TO PURCHASE WERE FILED HEREIN ON JUNE 27, 1912; THAT FULL, TRUE AND CORRECT COPIES OF SAID PROPOSALS TO PURCHASE ARE HERETO ATTACHED MADE A PART HEREOF, MARKED EXHIBIT 'A' AND 'B'; EXHIBIT 'A' BEING THE PROPOSAL TO PURCHASE ALL OF THE REAL AND PERSONAL PROPERTY OF THE BANKRUPT, EXCEPT THE TIMBER LANDS; EXHIBIT 'B' BEING THE PROPOSAL TO PURCHASE THE TIMBER LANDS OF THE BANKRUPT, EXCLUDING ALL THE OTHER REAL AND PERSONAL PROPERTY" (R. pp. 22-23, beginning at last paragraph on page 22).

Latter in said petition, the trustee states:

"YOUR PETITIONER IS OF THE OPINION AND VERILY BELIEVES THAT A LARGER SUM THAN IS ABOVE BID CANNOT BE OBTAINED, AND ADVISES THAT THE SAID REAL AND PERSONAL PROPERTY BE SOLD AND DELIVERED TO THE BIDDER. FOR THE REASON THAT SAID SAWMILL, PLANING-MILL AND PERSONAL PROPERTY HAVE BEEN AND ARE RAPIDLY DETERIORATING IN VALUE," * * * (R. p. 23, beginning second paragraph).

Again later on said petitioner states:

“THAT IN THE OPINION OF YOUR PETITIONER, SAID ESTATE IS UNLIKELY TO PRODUCE BETTER RESULTS AND HE VERILY BELIEVES THAT EACH OF THE PROPOSALS TO PURCHASE SHOULD BE ACCEPTED AND THE SALE CONFIRMED (R. pp. 23-24, beginning last paragraph on page 23).

On June 29, the referee caused a notice to be published to the creditors and other persons interested, of said proposals, which notice stated:

“WHEREAS, TO-WIT, ON THE 27TH DAY OF JUNE, A. D. 1912, THE PETITION OF THE TRUSTEE OF SAID ESTATE FOR THE APPROVAL AND CONFIRMATION OF A PROPOSED SALE OF THE RESIDUE AND REMAINDER OF THE PROPERTY, BOTH REAL AND PERSONAL, ALL AND SINGULAR, OF THE ABOVE NAMED BANKRUPT, AS IS MORE FULLY SET FORTH AND DESCRIBED IN SAID PETITION, AND PROPOSED SALE BEING FOR SEVENTY-FIVE PER CENT (75%) OF THE APPRAISED VALUE OF SAID PROPERTY” (R. p. 25).

And said hearing was set for the 15th day of July, 1912 (R. p. 25).

On July 10, 1912, the petitioner withdrew his two proposals to purchase (R. p. 26).

NOW IN BOTH OF THE WRITTEN PROPOSALS, IN THE PETITION OF THE TRUS-

TEE AND IN THE NOTICE OF THE REFEREE TO THE CREDITORS the whole matter was considered and treated merely as proposals to purchase and not a sale and at no place in the entire proceeding up to the time of the withdrawal by Mr. Jackson of his proposals is there one word or intimation that a sale had been made, or that the offers made by Mr. Jackson had been accepted by the trustee, or any one else for that matter. In fact, the trustee did not accept the offers but simply passed the proposals up to the referee and creditors to be accepted or rejected by them, and it never at any time entered his mind to accept the offers. All of this is clearly shown by the transcript and are the facts in the matter.

Two days after Mr. Jackson withdrew his offers, the trustee, well knowing that he had never made any sale, or accepted Mr. Jackson's offers, sold twenty-one thousand dollars worth of lumber, lath, moulding and cedar logs included in the Jackson proposal, to A. W. Lammers. (Please note that the logs sold to Mr. Lammers were the cedar logs included in Mr. Jackson's bid and not the fir and Tamarack logs, mentioned in Jackson's proposal, that permission was given to sell to the Atlas Tie Co. R. p. 13.) Thus again showing conclusively that the trustee had never accepted Mr. Jackson's offer and knowing this fact accepted the offer of Mr. Lammers and sold the property to him.

And with the Lammers sale the right was given

for the USE OF THE PLANING MILL, POWER PLANT AND EQUIPMENT NECESSARY TO MACHINE AND LOAD SAID LUMBER, LATH AND MOULDING, INCLUDING THE USE OF ONE OR TWO TEAMS OF HORSES, IF NECESSARY, FREE OF ANY ADDITIONAL CHARGE (R. p. 34, 17th line).

By the transcript, the deal with Mr. Lammers is shown to be a sale, and therefore the trustee placed himself in such a position that the proposals made by Mr. Jackson could not be accepted or confirmed.

Still, in spite of the fact that the trustee had sold part of the property included in the Jackson proposal to another party, the referee, on the 15th day of July, 1912, attempted to CONFIRM A SALE to Jackson, and this is the first time that mention is made of a sale having been made (R. p. 31), as theretofore all the proceedings had been in regard to accepting and passing upon the proposals made, not upon any sale.

Of course, it cannot be contended that the attempted confirmation is of any validity.

As a proposal to become a binding contract must be accepted in the exact terms of the offer. This being the case Jackson is entitled to recover on the grounds that his offers were never accepted, either in the quantities, sums, or terms offered. There is no showing whatever that the trustee ever accepted or attempted to accept Mr. Jackson's offer and until this offer was accepted (if the trustee had

the right to make the sale), the same could be withdrawn at Mr. Jackson's pleasure, and when Mr. Jackson withdrew his offer on the 10th day of July, 1912, before any acceptance had been taken on his proposals, the matter stood the same as if the offers had never been made.

This proposition of law is so well settled that citations are hardly necessary, but in support of the same is the case of

Minneapolis and St. Louis Railway vs. Columbus Rolling Mill, 119 U. S. 149.

In this case Mr. Justice Gray says:

"The rules of law which govern this case are well settled. As no contract is complete without the mutual assent of the parties, an offer to sell impresses no obligation until it is accepted according to its terms. So long as the offer has neither been accepted or rejected, the negotiation remains open, and imposes no obligation on either party, the one may decline to accept, or the other may withdraw his offer; and either rejection or withdrawal leaves the matter as if no offer had been made."

And all the decisions of the United States and the different states are in accord with the above law.

Therefore before the proposals made by Mr. Jackson could become binding contracts, there must be assent shown on the part of the trustee, and all the courts hold to this rule.

In the case of National Bank vs. Hall, 101 U. S.

50, the United States Supreme Court laid down the following rule:

“Without assent a thing was wanting, which was indispensable to the continuity of the contract.”

And in the case of *Klienhans vs. Jones*, 68 Fed. 742, the court, in passing upon the question of whether the minds of the parties met, held:

“Then, recurring to the rules of law whereby such binding contract may be formed, it is an elementary doctrine that, to constitute a valid contract, the minds of the parties must have met, and agreed to the terms of their agreement. It is necessary, not only that the parties shall have assented to the several terms of the contract, but, in order that there shall be any bond which shall tie the parties in mutual obligations, their assent must be communicated to each other.”

Parson on Contracts lays down the rule:

“There is no contract unless the parties assent, and they must assent to the same thing, in the same sense.

1 Parsons Contracts, 475.

And this assent must be communicated to the other party before an offer can become a contract.

In other words, a mere mental determination to accept an offer, a determination that is indicated to the other party in no way is not such an acceptance as will bind the parties or complete a contract.

7 Amer. and Eng. Ency. Law (2d Ed.) 129,
and cases cited.

All the authorities agree upon the above proposition of law, and it was so declared by Lord Blackburn in the House of Lords, who stated that this had been the law for 300 years, or since the case of *T. Pasch* 2, 17 Edward IV. In which case Chief Justice Brian decided this very point. The plea of the defendant in that case justified the seizing of some growing crops because he said the plaintiff had offered him to go and look at them, and if he liked them and would give 2s. 6d. for them, he might take them; that was the justification. * * *

Brian says:

“Moreover, your plea is utterly naught, for it does not show that when you made up your mind to take them you signified it to the plaintiff, and you having it in your own mind is nothing, for it is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is.”

Brogden vs. Metropolitan Ry. Co., 2 App.
Cas. 666, 692.

In the case of *Jenness vs. Mt. Hope Iron Co.*,
53 Maine 20, it was held:

“An intention to accept locked up in the breast of a party, and not communicated to the other, is not sufficient to constitute an acceptance.”

In the case of *White vs. Corlies*, 46 N. Y. 467, where the plaintiff, a builder, received from defendants a note to begin certain work at once and finish within two weeks, and without sending any reply the plaintiff immediately purchased lumber for the work and began to prepare it, and next day the order was countermanded, the court held:

"That inasmuch as there was no acceptance before the countermanding of the order that there was no contract and the mere fact that material had been purchased and work performed did not change the situation."

One of the leading cases, cited by nearly all the text writers, is the case of *Trounstine vs. Sellers*, 35 Kansas 447.

In this case, the plaintiff sold certain goods to Moore & Weaver, and a dispute arose as to terms of payment; Moore & Weaver wrote to plaintiff, that if the terms named by them were not satisfactory, that they would return the goods.

The plaintiff did not answer the letter, but immediately left on a western trip, intending to go to Ottawa, Kansas, and adjust the matter, but it was thirty days before his arrival and in the meantime a creditor had taken charge of the goods under a chattel mortgage, and the plaintiff replevined the goods, claiming that the act of leaving for Ottawa, Kansas, to accept said goods, was an assent to the agreement to return the same.

The court held:

“That the mere determination to accept an offer, does not constitute an acceptance which is binding.

The assent must be either communicated to the other party or some act must be done which the other party has expressly or impliedly offered to treat as a communication, a mere mental assent is not sufficient.”

In this case the court further held:

“That where parties are distant and the contract is made by correspondence, the mere writing of a letter or telegram is not sufficient to complete the contract, it must be placed in the mail, or deposited in the telegraph office for transmission, and thus place it beyond the power and control of the sender.”

And this is the law that has been followed without a dissenting opinion by every state that has had occasion to pass upon the point.

In *McCormick vs. Richardson*, 89 Iowa 535, a party ordered certain twine to be shipped about May 1, with full agreement as to price and terms, but the McCormick Company never notified defendant of the acceptance of the offer, but when the time came shipped the goods, which defendant refused to accept, and the court held:

“That a contract includes a concurrence of intention of two parties, one who promises to do something for the other, who, on his part, ac-

cepts such promise, hence consent or acceptance is indispensable to the validity of every contract.

A mere offer, not assented to, constitutes no contract, for there must be not only a proposal, but an acceptance thereof. So long as a proposal is not acceded to it is binding on neither party, and may be retracted."

Citing in support of this decision:

Goodpaster vs. Porter, 11 Iowa 161-163;
2 Kents Com. 477;
1 Parsons Contracts 475;
1 Storey Contracts 490;
Hilliard on Sales, Sec. 20;
Benj. on Sales, p. 73;
Bennett's Ed. 1892 Amer. Notes.

Where in the case at bar is there any showing whatever that the offers of the petitioner were ever accepted, much less any showing that any acceptance was communicated to Mr. Jackson.

Whether the trustee intended to accept the proposals of Mr. Jackson or not cannot be determined, he may have so intended, but it was necessary for him to signify his intention so that he would be bound on his part and so that Mr. Jackson would be in position to enforce that acceptance on his part, and that must be an acceptance such as Mr. Jackson could legally enforce.

The attorney for the respondent claims that the acceptance of Mr. Jackson's money constituted an acceptance and completed the contract, but I hardly

believe that such contention is seriously made, as the question has been decided numerous times, that the acceptance of money on an offer had no effect to change or modify a contract and does not give it any greater validity.

In the case of *Smith vs. Weaver*, 90 Ills. 392, the defendant wrote the following memorandum upon his book:

"Sold this day to N. Weaver a bill of lumber to complete a house for himself, at the following prices, provided he wishes to build this fall, or wishes to get the lumber for the house this fall."

(Signed) N. Weaver.

On the above memorandum Weaver paid the sum of \$500.

Afterwards he concluded not to build the house and demanded the return of his money, less the amount of lumber he had taken of Smith, and the court held, that the above memorandum was merely an offer until accepted and not a contract for \$500 worth of lumber, and the \$500 paid by Weaver at his own suggestion had no effect upon the contract and he was entitled to recover his money, as there had been no acceptance of the offer.

There is not one element of a contract in the case at bar, there was no meeting of minds, no mutuality of contract, no consideration, not even a promise for a promise.

Mr. Jackson could enforce nothing as against the trustee, and could not go into any court and assert any rights whatever, the proposals both included real property and under the statutes of Idaho agreements for the sale of real property must be in writing. The statutes of Idaho on this proposition are as follows:

"Sec. 6009. In the following cases the agreement is invalid unless the same, or some note or memorandum thereof be in writing and subscribed by the party to be charged, or by his agent. Evidence, therefore, of an agreement cannot be received without the writing or secondary evidence of its contents.

* * * * *

5th. An agreement for the leasing for a longer period of one year, or for the sale of real property, or of an interest therein, and such agreement, if made by an agent of the party to be charged, is invalid unless the authority of the agent be in writing, subscribed by the party sought to be charged."

Now, how, under these statutes, would it be possible for Mr. Jackson to enforce anything as against the trustee? There was no note or memorandum of any agreement subscribed by the party to be charged, and Mr. Jackson would have been unable to maintain any action against the trustee to enforce a sale.

A contract to be binding must be mutual, that is, so that both parties are bound and so the same can be enforced by both the parties. This has been

so held numerous times by the Supreme Court of the United States and the case of Tilley vs. Cook County, 103 U. S. 155, is very much in point.

We consider it unnecessary to answer those matters set forth in respondent's brief of matters not contained in the record.

There is no showing whatever in the record of the losses incurred as stated on page 13 of respondent's brief, nor is there any showing of bad faith on the part of the petitioner, as there was none, and the attempt to bring these matters before the court must, as of course, fail.

The attorney for the respondent in his brief argues that the trustee did everything that it was possible for him to do to accept this contract, but we deny this statement. for if the trustee had authority to sell at private sale (a fact we do not concede), then he could have accepted this proposition in writing, by noting his acceptance on the offer, or he could have entered into a written contract with Mr. Jackson, selling him this property, and if a sale was intended this should have been so done, and while a sale would have to have the approval of the court, still, if the sale was proper, the court would have approved the sale and Mr. Jackson would have the same right to demand an approval as the trustee and creditors. But in this case Mr. Jackson could not demand any rights whatever as no sale is shown or was ever made, and as to the meeting of minds, the

record fails absolutely to bear out the respondent's claims in that respect.

In regard to the authorities cited by respondent, a causal examination of the same will show that none are in point.

In re J. Jungman, 186 Fed. 320, is based upon an entirely different proposition, as the court held that the offer made by Hegeman & Co. had BEEN ACCEPTED WITHIN THE 3 DAY LIMIT STATED IN THE OFFER, AND THAT AFTERWARDS THE SALE WAS CONFIRMED WITH THE ASSENT OF THE PARTY MAKING THE PROPOSAL.

Of course, after a proposal is accepted, then the court has full authority to proceed to enforce its terms.

Besides, they held in this case, that the attorney for the purchaser was in court agreeing to the confirmation.

The case of Mason vs. Wolkowich, 150 Fed. 699, is not in point, but is a case of ratification, where the trustee actually sold property at a less price than authorized by the court, and then petitioned the court to affirm the sale, which the court did, and it was afterwards held that the filing of the petition was an affirmation by the trustee of the sale, but it was not held that the same was an acceptance of the bid, as is attempted in this case.

These cases then have no application to the case at bar.

Replying to the reasons given by respondent why the judgment should be affirmed, as to

First. We deny that the minds of the parties ever met as stated.

Second. There was no breach on the part of Jackson as no contract had ever been made.

Third. There was no sale to confirm, none had been made, and the proposals to purchase had been withdrawn, and the statement that property had to be sacrificed to meet payments to the Northern Trust Company, is childish, as this company being in bankruptcy, no creditor could force a sale without the permission of the court, so that all statements as regarding a forced sale have no bearing.

Fourth. There is nothing in the record showing any sacrifice whatever.

Fifth. There is nothing in the record showing bad faith on the part of Mr. Jackson and we contend it is unfair to make statements of this kind which have nothing to support them.

Sixth. We deny it would be a dangerous precedent to insist that all dealing with a trustee should be upon a business basis and in conformity to law, so that both parties to a transaction can be fully protected by the courts, as prospective purchasers of bankrupt estates must surely be given equal rights with a trustee, and it should not be more hazardous to deal with a trustee than with an individual, and it would truly be very dangerous and make the admin-

istration of estates more difficult if it is held that an offer to a trustee, unaccepted, cannot be withdrawn.

We again respectfully request that the decree of the Honorable District Judge be reversed, and a decree entered, affirming the order of the referee and requiring the trustee to refund to your petitioner, Duval Jackson, the sum of two thousand (\$2,000) dollars with interest.

Respectfully submitted,

FRANK W. REED,
EUGENE V. BOUGHTON,
Attorneys for Petitioner,
Coeur d'Alene, Idaho.

CLAY H. ALEXANDER,
Attorney for Petitioner,
Kansas City, Missouri.

Service of the within reply brief of petitioner Duval Jackson, on review, is hereby accepted, by the receipt of a copy thereof, this.....day of April, A. D. 1913.

.....,
Attorney for Trustee,
Coeur d'Alene, Idaho.



